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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

S1 15 Cr. 93 VEC

5 SHELDON SILVER,

6 Defendant.

7 -----x

November 19, 2015
3:00 p.m.

9
10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge
13 and a jury

14 APPEARANCES

15 PREET BHARARA,
United States Attorney for the
16 Southern District of New York
CARRIE HEATHER COHEN,
17 HOWARD SETH MASTER,
ANDREW DANIEL GOLDSTEIN,
18 JAMES M. McDONALD,
Assistant United States Attorneys

19
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21 BY: JOEL COHEN, Esq.
- and -

22 MOLOLAMKEN, LLP
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24 JUSTIN M. ELLIS, Esq.
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25 Of counsel

FBJYSIL1

1 (Trial resumed)

2 THE COURT: Mr. Molo.

3 MR. MOLO: Judge, I think we've set forth in our
4 papers pretty clearly --

5 THE COURT: Papers? No papers.

6 MS. COHEN: If you want an extra copy, I can hand one
7 up.

8 THE COURT: I'm happy to take one.

9 Mr. Molo, you're going to have to talk. They weren't
10 delivered.

11 MR. MOLO: You can follow along. I gave you a guide
12 to follow along.

13 Judge, as you'll see, when you get a chance to take a
14 look at what we filed, for either proof of honest services
15 fraud or extortion, there's got to be a quid pro quo.

16 Dealing with Dr. Taub first, the key case that we'd
17 like you to look at -- we cited a number of them -- skilling,
18 Ganim.

19 The idea of generalized goodwill and fostering
20 goodwill is not enough. The testimony from Dr. Taub, as
21 Your Honor has pointed out a number of times -- he did testify
22 that there was no explicit agreement to trade referrals in
23 exchange for or what I would call recommendations to the
24 patient in exchange for state grants.

25 In fact, though he did quite clearly, facing the

FBJYSIL1

1 potential for criminal prosecution and with the advice of
2 counsel, refused to sign that cooperation agreement that said
3 in exchange for.

4 I think that, to the extent there's any ambiguity in
5 the corresponding concerning explicit agreement and what that
6 meant, particularly in light of the rest of the testimony, that
7 his refusal to sign that letter that the government had put
8 forth is the end of the story.

9 It includes the language, "in exchange for," quid pro
10 quo. It could not be clearer, and he would not do that. Then
11 he obviously refused to acknowledge -- in fact, denied -- that
12 he would send referrals to Mr. Silver or Weitz & Luxenberg in
13 exchange for the son's job at Ohel, the daughter's free
14 internship, the Shalom Task Force benefit, and the Miles for
15 Meso thing which was, frankly, ridiculous.

16 Kirkland testified that he realized that producing a
17 run in Illinois wasn't quite the same thing as producing it in
18 Manhattan. There really has been no evidence of a quid pro
19 quo.

20 He's testified that he did want to, as he put it,
21 incentivize Mr. Silver to think favorably of his research and
22 maybe help with his research. He clearly wanted Mr. Silver to
23 help with Weitz & Luxenberg.

24 THE COURT: Mr. Molo, can I interrupt for just a
25 second.

FBJYSIL1

1 MR. MOLO: Sure.

2 THE COURT: A lot of what you you've just said is
3 persuasive arguments why, if Dr. Taub was a defendant, he would
4 be entitled to a directed verdict in his favor.

5 Focus on why the circumstantial evidence isn't
6 adequate to at least go to the jury against Mr. Silver.

7 MR. MOLO: Because the evidence against Mr. Silver --

8 THE COURT: It almost sounds like you're arguing that
9 if Dr. Taub is not guilty, sort of necessarily Silver is
10 not guilty.

11 MR. MOLO: In effect, that's true. There have to be
12 two to tango here. Dr. Taub has clearly said that he was not
13 sending those referrals.

14 The acts, the alleged acts, and the timing of them --
15 by the way, the sporadic nature of those cases going from
16 Dr. Taub to Weitz & Luxenberg over a period of time, not really
17 correlated with any of these acts, including the grants.

18 Some of the years after the grants are the years where
19 most referrals occur. I have to say, with all due respect, the
20 idea of that resolution was absolutely ridiculous. He was
21 laughing on the stand when I asked him the question, was that
22 in exchange for.

23 He said, well, it was nice to get the plack.

24 THE COURT: He had it hanging in his office.

25 MR. MOLO: All right. He had it hanging in his

FBJYSIL1

1 office. He said it was nice to get the plack. I'm sure it was
2 nice to get the plack.

3 Someone of Dr. Taub's credibility, someone of
4 Dr. Taub's experience, is not a experience who is going to
5 exchange referrals in exchange for grants for getting a plack.
6 That's just not going to happen.

7 THE COURT: Again, you're still focusing on Dr. Taub.
8 You need to focus on what is the circumstantial elements of
9 what was in Mr. Silver's head.

10 MR. MOLO: The fact of the matter is there is none.

11 THE COURT: There's none?

12 MR. MOLO: Well, the evidence was that he was at Weitz
13 & Luxenberg; that, yes. That was what he did at Weitz &
14 Luxenberg, generate business.

15 THE COURT: He gave two \$250,000 grants to Taub.

16 MR. MOLO: Right.

17 THE COURT: Who was sending him referrals --

18 MR. MOLO: Right.

19 THE COURT: Not referrals. Leads. Names and
20 addresses of patients, which were worth a lot of money to him.
21 He receives leads that are worth lots of money. He gives the
22 doctor who's giving him the leads a lot of money.

23 As soon as it's going to become public, the grants
24 cease.

25 MR. MOLO: The grants cease because HCRA money ended.

FBJYSIL1

1 There's testimony in the record that the HCRA money had ended.

2 THE COURT: I don't remember that evidence.

3 MR. MOLO: It was the testimony by the state witness
4 Franco. Victor Franco testified that the HCRA money ended at
5 that point in time. There's clear testimony -- and I elicited
6 it from Dr. Taub. You may remember --

7 THE COURT: Even if the HCRA money ended, it's not
8 like that ended Mr. Silver's pot of money. He had other cash
9 that he was able to disseminate for a variety of different
10 reasons.

11 MR. MOLO: And he didn't because, as I elicited from
12 Dr. Taub, the fax that went from Steve August to Dr. Taub where
13 it says specify what your work is going to be is this 9/11 --
14 remember the piece that talked about is it going to be research
15 related to air quality, 9/11, mesothelioma. I'm paraphrasing.
16 I'm not reading the exact language.

17 He put that in the grants. It was in the contract.
18 He also clearly did not do that. That was clear. It was
19 communicated --

20 THE COURT: So your theory is that Mr. Silver could
21 not have given him another grant because of that?

22 MR. MOLO: Well, I don't think the standard is if he
23 could have given him another grant, that the first two
24 necessarily were corrupt.

25 THE COURT: You would agree that there is at least

FBJYSIL1

1 more than one way of looking at that evidence.

2 MR. MOLO: Not fairly. I don't. I think a jury --

3 THE COURT: Okay.

4 MR. MOLO: I understand you're being dismissive of
5 what I'm saying.

6 THE COURT: I'm not being dismissive. I just don't
7 think you're focusing -- most of the time so far, you've spent
8 focusing on Dr. Taub's state of mind.

9 I'm trying to get you to focus on what the
10 circumstantial evidence is that suggests that Mr. Silver had a
11 different state of mind relevant to his relationship with
12 Dr. Taub.

13 MR. MOLO: What you've just suggested to me is the
14 fact that these two grants went, and that they stopped going
15 after the first two.

16 THE COURT: Once it was going to become public.

17 MR. MOLO: I'm telling you that the HCRA money ended.
18 I'm also telling you --

19 THE COURT: Can you refer me in the record where it
20 indicates that the HCRA money was no longer available.

21 MR. MOLO: It's in Franco's testimony. I will get it
22 for you.

23 THE COURT: Okay.

24 MR. MOLO: In the meantime, I'll proceed, if that's
25 okay, while we get that for you.

FBJYSIL1

1 THE COURT: Absolutely.

2 MR. MOLO: Beyond that, we have Dr. Taub not
3 fulfilling his obligation under the contract. He clearly did
4 not do that. If you recall, at the same time --

5 THE COURT: How did he not do it the second year but
6 did do it the first year?

7 MR. MOLO: If you recall the timing on these grants,
8 which they could be renewed. It says that in the grant itself.
9 The first one there's a delay in getting it going, and the
10 second one backs up to it in a way that there's almost an
11 overlap.

12 There isn't really a period of time, you know, for a
13 full report. So it was moved over into the second year. And
14 he's not living up to what he said he was going to do.

15 That evidence is very clear in the record. It was
16 clear as to what he was asked to do and what he promised to do.
17 It was clear by his testimony that he didn't do it.

18 THE COURT: What's the evidence that that was what was
19 motivating Mr. Silver?

20 MR. MOLO: Because August said --

21 THE COURT: What's the evidence that he even knew
22 that?

23 MR. MOLO: Of the 9/11?

24 THE COURT: That he knew your theory that Dr. Taub
25 wasn't doing what was required under the grant.

FBJYSIL1

1 MR. MOLO: Because he has his -- I'm sorry. He has
2 those talking points that were introduced into evidence.

3 THE COURT: "He" who?

4 MR. MOLO: Dr. Taub.

5 THE COURT: No. Silver.

6 MR. MOLO: Dr. Taub had talking points in anticipation
7 of a conversation with Mr. Silver. He talked about -- he
8 talked about, if you will recall, he was prepared to discuss
9 the issue of maybe Columbia could partner with Mount Sinai and
10 proceed on doing this research with Mount Sinai, and that would
11 be a reason for him to continue getting that money. In fact,
12 he didn't live up to the obligation.

13 THE COURT: Again, what is the evidence -- I
14 understand that's your theory.

15 What is the evidence that Mr. Silver knew that in any
16 way?

17 MR. MOLO: Well, because he sent reports to the state.
18 He's testified to that.

19 THE COURT: There's no evidence --

20 MR. MOLO: It's not my burden --

21 THE COURT: You have no burden. I completely agree
22 with that. You're saying that the circumstantial evidence of
23 big grant, big grant, no grant where the intervening action in
24 there was it was going to become transparent; that a jury
25 cannot conclude from that that there was a corrupt motive

FBJYSIL1

1 involved because of course Dr. Taub didn't get another grant
2 you say. He violated the prior one.

3 That may be a reasonable argument, and it may be
4 enough to break the circumstantial chain if there's any
5 evidence that that's what Mr. Silver knew or from which a jury
6 could conclude that Mr. Silver knew that.

7 MR. MOLO: Let me posit it to you another way, from a
8 different perspective. The referrals -- I'm going to call them
9 "referrals" for shorthand.

10 The referrals begin and are solid for a period of time
11 before there's a grant, and they're solid for years after
12 there's a grant, including years in which none of these
13 purported official acts even occur.

14 So, if in fact there was some corrupt arrangement and
15 Mr. Silver had some corrupt intent, it would seem as though
16 there would be something back-and-forth there.

17 I don't think you can look at it just exclusively and
18 say what was in Mr. Silver's mind without asking what was in
19 Dr. Taub's mind.

20 Dr. Taub is saying that there's no agreement and
21 there's no quid quo pro and he's not sending them in exchange
22 for that -- and, in fact, the record evidence is quite clear
23 that his goal was to incentivize Mr. Silver to send Weitz &
24 Luxenberg money.

25 Dr. Taub would have to be -- and he's not. He would

FBJYSIL1

1 have to be the dumbest person in America to think that he could
2 keep referring cases to Mr. Silver so many years after these
3 grants had stopped and that he would somehow get another state
4 grant. It's just not there.

5 The evidence doesn't support a quid pro quo. On the
6 Taub piece of it, the government has not met its burden. If
7 all they have is that two \$250,000 grants which, by the way,
8 were not extraordinary grants in the amount of money they were.

9 There were many more grants that were. These were to
10 Columbia University and to Presbyterian Hospital. These were
11 not to Dr. Taub personally.

12 If Mr. Silver wanted to be a corrupt briber of
13 Dr. Taub in that sense, he picked an awfully odd way to get him
14 money, by having not money that went directly to -- not money
15 that went directly to Dr. Taub. It went to Columbia University
16 and to New York Presbyterian.

17 THE COURT: There's absolutely no evidence that
18 Dr. Taub is corrupt.

19 MR. MOLO: Right.

20 THE COURT: Dr. Taub's motive was getting money for
21 research.

22 MR. MOLO: Right.

23 THE COURT: So the grants going to the school and the
24 hospital were consistent with what Dr. Taub wanted.

25 MR. MOLO: Right.

FBJYSIL1

1 THE COURT: So the notion of, well, he could have
2 given money to Dr. Taub -- that argument has some weight if you
3 think Dr. Taub is personally corrupt.

4 Because then but for a personal benefit to him, he
5 wouldn't be incentivized to provide anything back to Silver.
6 But that's not the evidence, and that's not the claim.

7 MR. MOLO: It would be an awfully odd quid pro quo for
8 one person to be corrupt and the other not. That's what the
9 essence of a bribery scheme is.

10 That's another reason why this fails. Skilling tells
11 us that on the honest services period. It's got to be in the
12 context of a classic bribery scheme, and that's not the case
13 here.

14 THE COURT: There's a string of cases that say that
15 you can have -- that within those schemes both sides don't have
16 to be corrupt. You can have an innocent side and a corrupt
17 side.

18 MR. MOLO: When you look at Skilling, that's not what
19 Skilling says. Skilling says it's got to be classic bribery.
20 Classic bribery means both people have to be corrupt. For an
21 honest services fraud to occur, that's the case.

22 Here we have again, to your point, Judge, the evidence
23 being that Mr. Silver sends two \$250,000 grants, one to
24 Presbyterian Hospital and one to Columbia University, a very
25 odd way, I guess, for Mr. Silver to bribe Dr. Taub, if that's

FBJYSIL1

1 the allegation.

2 He's going to send it to these big institutions with
3 all of the review that occurs in those organizations. I
4 understand on the stateside there's no peer review. There's no
5 competitive bidding process. That wasn't required in any of
6 these grants. These grants were not extraordinary.

7 THE COURT: It doesn't have to be extraordinary. He
8 could be guilty of corruption if he gave the man a thousand
9 dollars.

10 MR. MOLO: I agree with that, but it's at least the
11 evidence that that didn't occur.

12 THE COURT: That's a question of fact. You're saying
13 these aren't so big. They aren't big enough that they would
14 really incentivize a doctor to send clients his way. Again,
15 you're sort of ignoring all of the other circumstantial
16 evidence.

17 MR. MOLO: I'm not. Judge, to that point, I think a
18 key point is why do these referrals continue at a relatively
19 steady pace, a little bit up and down, but it's clearly at a
20 steady pace, after the last grant.

21 If in fact this is some kind of scheme -- Mr. Silver
22 could have gotten, I guess, some other state grant money and
23 sent it to him. As far as disclosure went, it was Mr. Silver
24 that sponsored the Budget Reform Act that made things more
25 public.

FBJYSIL1

1 It would be a very odd scheme for him to understand
2 that he could do things secretly and say, you know what. Now
3 that HCRA is expired, I'm going to require that any other money
4 that I might give him that would be public money be made
5 public. That would be a very, very odd scheme.

6 THE COURT: That last argument you've made, Mr. Molo I
7 just don't think the evidence supports. As you are crafting
8 the evidence, it is Mr. Silver was the champion of transparency
9 in state government.

10 There is no evidence of that. None. The fact that he
11 may have been a sponsor on a bill where he had a gun to his
12 head does not mean that he's a champion of transparency.

13 MR. MOLO: Nobody said he had a gun to his head.
14 There's no evidence he had a gun to his head, and I didn't say
15 he is the champion of transparency.

16 I said it would be very odd for him to be able to send
17 these grants without disclosure and then be in favor of and
18 sponsor a bill which would only require disclosure.

19 That doesn't necessarily rise to being the champion of
20 transparency, and it is odd. This is as thin a case as could
21 ever be imagined.

22 It didn't go the way the prosecutors thought it was
23 going to go.

24 THE COURT: That's irrelevant. Whether it did or it
25 didn't is irrelevant.

FBJYSIL1

1 MR. MOLO: So where we are now is, as I've heard the
2 Court articulate it, the best evidence is that two bona fide
3 state grants went to two bona fide medical institutions that
4 are two of the finest in the world in New York to do bona fide
5 research, and Mr. Silver, who was in the position to sponsor
6 those grants, is now somehow held accountable because New York
7 law allows him to work at Weitz & Luxenberg, make whatever
8 money he makes at Weitz & Luxenberg -- he could have made a
9 billion dollars a year at Weitz & Luxenberg or a dollar a year
10 at Weitz & Luxenberg. It didn't matter -- and Dr. Taub
11 referred them to patients who got good representation.

12 I understand the Court's view that a lot of this is
13 not necessarily to the issue of whether or not the patients got
14 good representation --

15 THE COURT: No --

16 MR. MOLO: Or whether or not there's a quid quo pro.
17 But, when one of the parties says there's no quid quo pro and
18 the other side of that the best evidence is that Mr. Silver
19 sent these grants -- I don't see how that could possibly go to
20 a jury.

21 As to the real estate piece, it's the oddest bribe
22 scheme ever alleged for the bribers to know that they weren't
23 paying bribes. That fell so flat. It's incredible.

24 2012 is when -- or the very end of 2011 is when
25 Glenwood testifies that they learn of the Golberg & Iryami

FBJYSIL1

1 referral fees being paid, and putting aside -- let's just put
2 aside for a moment that those were perfectly legitimate
3 referral fees. Whether or not they were fully compliant with
4 the legal ethics rules at each step of the way is a different
5 issue.

6 Putting that aside for the moment, how could they
7 possibly have been bribing Mr. Silver to act on the 2011 rent
8 control laws when they didn't even know that the money was
9 being paid. It's just impossible.

10 THE COURT: But they knew they were doing what
11 Mr. Silver asked them to do, which is to throw business to
12 Goldberg.

13 MR. MOLO: Okay.

14 THE COURT: As I remember Witkoff's testimony
15 specifically, it was, my buddy, Goldberg, needs the money. Do
16 me a favor.

17 MR. MOLO: Right.

18 THE COURT: So they did him a favor. That's
19 irrelevant?

20 MR. MOLO: Not in exchange for anything.

21 THE COURT: For maintaining -- I'm not sure -- that's
22 not what Witkoff's testimony was.

23 MR. MOLO: Witkoff's testimony was -- and I asked the
24 question. Actually, he volunteered the answer before I asked
25 the question. He said general goodwill. That is what is not

FBJYSIL1

1 allowed. It does not rise to the level of bribery.

2 Witkoff's testimony was that way, and Runes' testimony
3 with the same thing; that they were interested in
4 maintaining -- in fact, the question was asked of him, well,
5 you were interested in maintaining a good relationship with
6 Mr. Silver.

7 He said, I'm interested in maintaining good
8 relationships with both sides of the aisle in both houses. He
9 didn't say that. He said the leadership throughout the
10 assembly is what he said.

11 So this is a very, very odd scheme for that to be
12 alleged where the "briber" doesn't even know that a bribe is
13 being paid. I just don't see how there is anything about these
14 allegations that rise to the level of getting this to a jury.

15 This case has -- also Runes also testified that
16 Mr. Silver never did anything for them. In fact, the testimony
17 was quite clear. He voted against this every time.

18 THE COURT: Except on whatever the 2013 or 2011 --

19 MR. MOLO: He didn't say -- the testimony wasn't
20 Mr. Silver voted for us. It was we went and saw Mr. Silver,
21 and we thought we could live with what was going to happen.

22 But that was the first positive development for
23 tenants in a decade. So that was a pro-tenant bill, and it was
24 a compromise bill. The prosecution is trying to turn
25 compromise into some kind of bribery and corrupt intent. It's

FBJYSIL1

1 just not there.

2 As to the real estate side of things, it is -- by the
3 way, Runes, as far as that side letter went, is on the
4 Character and Fitness Committee. He's a judge at the time.

5 He testifies he went and got this checked out with
6 what the person that he thought was the right person to look at
7 this --

8 THE COURT: From a lobbying perspective.

9 MR. MOLO: That's right.

10 THE COURT: Not from a criminal law perspective.

11 MR. MOLO: The man had been a lawyer for 35 years. He
12 was counsel to ALM. He was a judge, and he's on the Character
13 and Fitness Committee.

14 He's going to say, you know what. Maybe there's a
15 problem with respect to a lobbying regulation, but it just
16 doesn't dawn on me there's a bigger problem if he thought there
17 was a bigger problem?

18 I mean, certainly the man would have acted on it. The
19 reason that he didn't was because he knew there was no problem.
20 He testified that Silver -- we never asked Silver to do
21 anything for us. He never did anything for us, and he voted
22 against us every time.

23 On the real estate side of things, there is nothing.
24 On the money laundering --

25 THE COURT: We don't get to money laundering if you're

FBJYSIL1

1 right on the first two.

2 MR. MOLO: That's exactly right. Judge, I don't see
3 how this can go to the jury. The ridiculous -- I do use that
4 term advisedly -- the ridiculous allegations concerning the
5 proclamation and concerning the daughter getting a free,
6 nonpaying internship with a judge and the son --

7 THE COURT: You keep denigrating these nonpaying
8 internships with judge. Let me tell you something. We as
9 judges appreciate those intern. They're very helpful. From
10 the students' perspective, they like having it on their resume.

11 MR. MOLO: They're useful, and it's beneficial.

12 THE COURT: The fact that it was a nonpaying job -- it
13 may be disdainful to you, but I'm confident it's not to the
14 student.

15 MR. MOLO: I've had plenty of nonpaying jobs,
16 your Honor. I still have some.

17 The point of the matter is to suggest that that is an
18 official act, to help a law student connect with a judge who
19 then writes her letter of recommendation in order to be
20 admitted to the bar --

21 THE COURT: It's the call that is the issue.

22 MR. MOLO: It does not make sense, Judge. They have
23 not met their burden. This case should not go to the jury.
24 We'd like a directed verdict.

25 THE COURT: Okay. Government.

FBJYSIL1

1 MR. MASTER: Yes, your Honor. Mr. Molo has left out a
2 huge part of the story, which is Mr. Silver's own words and
3 actions.

4 In his ongoing provision -- let's just focus first on
5 the asbestos scheme -- his provision of a stream of official
6 benefits to Dr. Taub in exchange for these extremely valuable
7 million-dollar mesothelioma leads.

8 Mr. Molo neglected to mention that Sheldon Silver is
9 the one who said that he wanted cases right after Dr. Taub said
10 that he was interested in getting research money.

11 And Sheldon Silver is the one who dangled the
12 possibility of state funding immediately after Dr. Taub,
13 responding to Sheldon Silver's request, began sending a case.

14 So we had evidence that the very first patient who was
15 sent to Sheldon Silver as a mesothelioma lead, the O'Leary
16 case, followed very soon after Dr. Taub asked for support from
17 Weitz & Luxenberg which Sheldon Silver never bothered to
18 pursue.

19 We had evidence of that from Arthur Luxenberg and
20 Perry Weitz, that Sheldon Silver never even presented them with
21 the opportunity. Instead, Sheldon Silver dangled the
22 possibility of state funding which he controlled, this HCRA
23 pool which was not subject to public disclosure, was not
24 transparent at all.

25 The fact that Dr. Taub began sending these cases when

FBJYSIL1

1 the grant request was "under consideration" by Sheldon Silver
2 is only further evidence of Sheldon Silver's intent here.

3 Not only did he make Dr. Taub wait until after a huge
4 check was deposited into his bank account until he okayed the
5 funding, but he had Dr. Taub come to the state of the state,
6 where he saw -- Dr. Taub saw Sheldon Silver inaugurated, saw
7 the extent of his power, met one of his aides who he felt might
8 be able to help fund the research.

9 Mr. Molo neglected to mention, perhaps by oversight,
10 that Sheldon Silver told Dr. Taub to keep this a secret.

11 THE COURT: Specifically not to tell their mutual
12 friend as I recall.

13 MR. MASTER: Correct. Not to tell the mutual friend
14 who had brought the two of them together about the stream of
15 mesothelioma leads that were going to him at Weitz & Luxenberg.

16 The Bruno case and other cases also hold that secrecy
17 and concealment can be evidence of this corrupt intent. We
18 have tremendous evidence of that here.

19 Again, not only Sheldon Silver saying, keep it a
20 secret, but we have Sheldon Silver lying repeatedly to the
21 public about how he gets his cases.

22 You just heard evidence from Michael Whyland about how
23 Sheldon Silver would say that he gets cases because people come
24 to him, because he's been a lawyer for 40 years and he knows
25 people in the community.

FBJYSIL1

1 You heard evidence that these mesothelioma cases came
2 from all over the country. Sheldon Silver never even spoke to
3 them. He just passed the information on that he got from
4 Dr. Taub, and he gave it to Charles Ferguson, who actually made
5 contact with these people and did the work.

6 He doesn't know them at all. He just gets the money.
7 He also said falsely that he spends hours a week evaluating
8 potential cases to see which ones have merit.

9 You heard from numerous witnesses that he has no
10 ability to do such evaluation on these cases he was getting
11 from Dr. Taub, and he never did any evaluation, again, both
12 lies.

13 As far as this bogus him not doing 9/11 issue, Sheldon
14 Silver told Dr. Taub that he "couldn't do it anymore." That
15 was the reason he gave after the grants became transparent.

16 It wasn't, sorry. You're not living up to your
17 obligations on 9/11. That never came up. Sheldon Silver never
18 even asked about the research. That's what Dr. Taub said.

19 So there's no evidence that he cared one bit about
20 what Dr. Taub was doing with this grant money. Instead,
21 Sheldon Silver was concerned about discovery of the scheme.
22 All the evidence points to that. All the evidence points to
23 his corrupt intent.

24 With respect to their effort to break out these
25 individual benefits and the stream of benefits and saying,

FBJYSIL1

1 well, Dr. Taub didn't do it for a proclamation. Dr. Taub
2 didn't do it for a job for his daughter.

3 First of all, as your Honor says, that's beside the
4 point because it's Sheldon Silver's intent that matters.
5 Moreover, as opportunities arise, the theory of honest services
6 fraud makes clear that it doesn't have to be a single benefit.
7 It could be a stream of benefits. It could be to be available
8 as opportunities arise.

9 That is exactly what Sheldon Silver did. When he was
10 requested by Dr. Taub and when Dr. Taub provided leads to
11 valuable mesothelioma cases, he responded.

12 When Dr. Taub asked for a job for his son, Sheldon
13 Silver called Ohel, an organization that is heavily dependent
14 on him for the first and only time in 20 years. And he said,
15 hire Jonathan Taub. He followed up, how is it going along is
16 this. David Mandel got the message.

17 That judge -- that was the first and only time Sheldon
18 Silver has ever contacted that judge to get a job for anyone,
19 other than his mother-in-law.

20 THE COURT: We can assume that wasn't for corrupt
21 reasons but for other reasons.

22 MR. MASTER: There may have been many reasons for
23 that, and that's not at issue in this case fortunately.

24 It just shows how important Dr. Taub was. With
25 respect to that proclamation and resolution, clearly it was

FBJYSIL1

1 important to Sheldon Silver.

2 He rushed, and he had his staff got it done, and he
3 was there for that photo op. He knew how important it was
4 going to be to Dr. Taub.

5 So the idea that this was a throw-away, this wasn't
6 important to him when he was getting many times his state
7 salary off of this quid pro quo relationship is ridiculous.

8 THE COURT: Do you want to talk about real estate?

9 MR. MASTER: With respect to real estate, as
10 your Honor pointed out, again, it is Sheldon Silver's intent
11 that matters. It is clear that he used his official position
12 and his power over these developers who he knew were heavily
13 dependent upon him because they routinely came to him for
14 things.

15 Glenwood hired a team of lobbyists to lobby him and
16 had all sorts of interactions with him. He knew Glenwood was a
17 one-trick pony as Mr. Runes described, and he used his official
18 position in order to get them to throw business to his friend.

19 As your Honor explained in the draft charges, the law
20 reflects third-party benefit kickbacks are sufficient. So it
21 was sufficient for Sheldon Silver -- if these developers knew
22 that they were paying Jay Arthur Goldberg at his request in
23 order -- not only to foster generalized goodwill, mind you,
24 but, as both Mr. Runes said and as Mr. Witkoff said, again,
25 something Mr. Molo failed to mention, they did not want to

FBJYSIL1

1 alienate him. That's at transcript 2025 and 2027 of Steve
2 Witkoff's testimony, and he said it repeatedly.

3 Mr. Molo challenged him to say it was only about
4 fostering goodwill, and that's not what Steve Witkoff said. Of
5 course, who would forget Mr. Runes saying that discovering this
6 issue was like holding a tiger by the tail; that this was not
7 something that he was just doing to foster goodwill; that
8 Glenwood was just doing to foster goodwill.

9 It was thrust upon them, and they felt they had no
10 choice but to continue the relationship because of Sheldon
11 Silver's power to hurt them. There is ample evidence of that.

12 Again, Sheldon Silver's secrets and lies are relevant
13 to his state of mind. All of the efforts by defense to show
14 that he didn't "have" to disclose certain things on his
15 disclosure forms fall flat here because he certainly didn't
16 disclose his income from Golberg & Iryami, from these clients,
17 to anyone on his disclosure forms and to his own spokesman or
18 to the public.

19 He kept on saying, I represent individuals who have
20 claims against other individuals, no one with any business
21 before the state.

22 He said that, people come to me for business, just as
23 he did with respect to the asbestos scheme. That, of course,
24 was a lie because you heard from Steve Witkoff that Sheldon
25 Silver had hit him up for business, and he felt that he should

FBJYSIL1

1 do it because he didn't want to alienate him.

2 So I think for each of the -- and Mr. Runes said that
3 he needed Sheldon Silver to be available to Glenwood on an
4 as-needed basis because things always came up.

5 This was not over in 2011. This was going to come
6 up -- the rent laws that were so essential to them were going
7 to expire again and come up again.

8 They were afraid that if they harmed Sheldon Silver's
9 economic interests, he would hurt them. And he had many
10 opportunities to do so on a routine basis, given his role as
11 what many witnesses have explained as the most powerful person
12 in New York.

13 THE COURT: Mr. Molo.

14 MR. MOLO: There was no evidence that Mr. Silver said,
15 okay. On this first grant. Don't fund it and then now fund it
16 at some point in time. The evidence is that that process ran
17 its course through the state government.

18 There is no evidence to that fact. There's no
19 evidence of him -- once he got these letters, just sending it
20 along to the process and letting the process take its course.

21 There's none. There's not even any circumstantial
22 evidence that he somehow put a thumb on the scale one way or
23 the other with respect to Dr. Taub's grants. He processed them
24 like others would be.

25 THE COURT: He was solely responsible for Dr. Taub

FBJYSIL1

1 getting grants, solely. Solely and individually responsible.

2 MR. MOLO: Correct. But what the government just got
3 up and argued is that he somehow laid back and timed it in a
4 way so that he was waiting for Dr. Taub to get him cases.

5 There's no evidence of that. The evidence is that
6 these grants ran their course once the letters came to him,
7 just like all sorts of grant requests come to Mr. Silver and
8 come to everyone else. This is the problem with this case.

9 THE COURT: Most of them are denied.

10 MR. MOLO: I'm sorry?

11 THE COURT: Most of them are not granted. Most
12 requests are not granted.

13 MR. MOLO: Because there isn't enough money.

14 THE COURT: But he still had money on the table when
15 he quit funding Dr. Taub.

16 MR. MOLO: Because he acted, as Mr. Franco said,
17 responsibly.

18 THE COURT: Oh, please. The jury may buy that. They
19 may. They may buy that that's what was going on.

20 MR. MOLO: Because what he said, Judge, is that in
21 some instances there were organizations that were dependent
22 upon regular state funding. And, in some years, that funding
23 wasn't available because of what was appropriated.

24 By having some reserve, they were able to help these
25 organizations move forward. That's quite clear. If you

FBJYSIL1

1 remember, there was a little joke in the testimony when he
2 said, we're conservative making a joke of that, him being a
3 democrat, that he was conservative. It's not a joke, and it's
4 not funny to suggest --

5 THE COURT: So your argument is that the reason that
6 the funds stopped is because there was not money available?

7 MR. MOLO: No. That's not my argument.

8 THE COURT: Okay.

9 MR. MOLO: My argument is that there was no more HCRA
10 money available.

11 THE COURT: There was other money that could have been
12 used for the same purpose.

13 MR. MOLO: Dr. Taub wasn't doing what he said he was
14 going to do.

15 THE COURT: So you're back to that. Okay. So why all
16 the secrecy then?

17 MR. MOLO: The secrecy -- there's a heck of a lot of
18 secrecy. Dr. Taub talks freely with the people that he works
19 with.

20 These are going to Weitz & Luxenberg. The clients are
21 going to Weitz & Luxenberg. Dr. Taub is out at the American
22 Cancer Society getting photographed with Mr. Silver. There's
23 one conversation that they allude to -- they deem it's
24 "Secrecy."

25 Mr. Silver says, don't mention this to our friend. He

FBJYSIL1

1 wasn't saying, keep it secret. Those weren't even the words
2 that were used. It was, don't mention this to our friend who
3 is the intermediary. So the secrecy isn't there.

4 THE COURT: You don't think the jury can conclude that
5 that is indicative of a state of mind on the part of your
6 client that he did not want this known because it was untoward?

7 MR. MOLO: No, not in light of everything else that
8 occurred. In it was not otherwise public. But, in fact, it
9 was extraordinary public.

10 THE COURT: What wasn't public was that Taub was
11 sending leads to Silver. Weitz & Luxenberg knew that. The
12 individual patient knew it, but none of the staffers knew it.

13 When asked who his clients are, he talks about
14 personal injury cases. He doesn't talk about, by the way, I've
15 got a doctor on staff at Columbia who's sending me all of his
16 mesothelioma patients.

17 MR. MOLO: In addition to Weitz & Luxenberg, Taub's
18 testimony was he called Mr. Silver's legislative office and
19 left messages with the referral information.

20 The prosecution introduced scraps of paper that had
21 that information on it. Again, it would be a very odd --

22 THE COURT: That doesn't make it public.

23 MR. MOLO: Judge, it's not like he's required --
24 Mr. Silver is required to issue a press release or Dr. Taub is
25 required to issue a press release. This is the normal course

FBJYSIL1

1 of business. This is the way people conduct their lives.

2 THE COURT: Mr. Molo, the issue is it's one thing when
3 you're conducting your life that way and you're not also doling
4 out taxpayer dollars. Mr. Silver is not just any lawyer who's
5 got a relationship with a doctor at Columbia Presbyterian.
6 That's the problem.

7 MR. MOLO: Right.

8 THE COURT: Then, sort of in addition to the
9 conversation with their mutual friend, when asked about their
10 clients, he does not disclose that he has a source of
11 mesothelioma patients from Columbia Presbyterian Hospital.

12 He portrays his practice very differently. Your
13 skepticism may win the day with the jury. But the notion that
14 there is not a question of fact, there's not adequate evidence,
15 circumstantial evidence to go to the jury I don't buy.

16 Do you want to talk about the tax scheme?

17 MR. MOLO: The tax scheme. The tax cert scheme. I'm
18 sorry. I wasn't focused on that.

19 Again, it's the same issue. How is someone committing
20 a bribe, paying a bribe, not knowing that they're paying a
21 bribe? That can't happen.

22 This was discovered after, long after, the legislation
23 at issue. As to the --

24 THE COURT: Focus on the extortion claim.

25 MR. MOLO: The extortion claim -- they testified

FBJYSIL1

1 goodwill. They used the word didn't want to alienate. There
2 was no testimony Mr. Silver ever raised an eyebrow let alone
3 threatened either of these people; that there was any exchange
4 of an official act.

5 Neither of them said there was an exchange of an
6 official act. I asked that question expressly of Runes, of
7 Meara, and of Witkoff. All of them said there was no official
8 act exchanged.

9 So there's just no way that this could be fairly
10 deemed extortion under Sekhar.

11 Again, Judge, this was filed on Pacer at noon. We
12 should have also sent a copy to your chambers.

13 THE COURT: We didn't get an alert.

14 MR. MOLO: We haven't always followed the practice of
15 sending something in addition to filing it on Pacer. I would
16 invite you, before you rule, to please read what we filed. It
17 sets the case law out quite clearly. The case law clearly
18 states that there is no case here.

19 Thank you, your Honor.

20 THE COURT: Is there anything further from the
21 government?

22 MR. MASTER: No, your Honor.

23 THE COURT: Let's have the charge conference. I will
24 reserve on Rule 29.

25 (Pause)

FBJYSIL1

1 THE COURT: What's the first comment that the
2 defendant has?

3 MR. KRY: That. one should be non-controversial on
4 page 13.

5 THE COURT: Do you have a comment before page 13,
6 Ms. Cohen?

7 MS. COHEN: We do not, your Honor.

8 THE COURT: I might. Where is the charge on -- so we
9 had no expert testimony. Correct?

10 MS. COHEN: Correct, your Honor.

11 THE COURT: So that comes out.

12 On cooperating witnesses --

13 MS. COHEN: What page are you on, your Honor?

14 THE COURT: Page 9. Was it just Dr. Taub and
15 Mr. Meara who had cooperation agreements?

16 MR. MOLO: And Dara Iryami.

17 MR. GOLDSTEIN: The word "several" should be changed
18 to "two."

19 MR. MASTER: Actually, your Honor, as we're paging
20 through, I do see in brackets. We were focused on more
21 substantive evidence. If you're going page by page 7 to 8,
22 there's bracketed text. One of the stipulations was --

23 MS. COHEN: There were testimonial stips.

24 MR. MASTER: So I believe all of the stipulations had
25 testimonial elements.

FBJYSIL1

1 MS. COHEN: Just the hospital stip had testimony.

2 MR. MASTER: More substantive testimony.

3 THE COURT: So it was just one.

4 MR. MASTER: All of them were framed as "If called to
5 testify, a custodian of witness would say." They were not
6 factual stips in the sense --

7 THE COURT: Even though we're sitting at a table, you
8 still have to talk one at a time.

9 MR. SHUR: There was the hospital stip, the bank
10 records stip, and the email stip all had testimonial aspects.

11 THE COURT: I'll fix that so it's not one and brackets
12 come off.

13 So page 12.

14 MS. COHEN: Page 12, your Honor, under summary charts,
15 it says "government has presented." The defense did as well.

16 THE COURT: I'll change that to the "parties" have.

17 MS. COHEN: It's under K on page 12.

18 THE COURT: Mr. Silver did not testify. So the first
19 paragraph on page 13 is in. The second paragraph is out.

20 That brings us -- what's your first comment?

21 MR. KRY: That was it.

22 THE COURT: What's your next comment?

23 MR. KRY: Page 17.

24 THE COURT: Do you have anything before page 17?

25 MS. COHEN: No, we do not, your Honor.

FBJYSIL1

1 THE COURT: Okay. 17, line what?

2 MR. KRY: Line 14 on page 17 through line 2 on page
3 18.

4 THE COURT: Okay.

5 MR. KRY: The defense would want to omit that. It was
6 already earlier in the general instructions, an instruction
7 differentiating between direct and circumstantial evidence.

8 The concern here is the way this instruction is
9 written is somewhat slanted and almost encourages the jury to
10 draw inferences from circumstantial evidence. We think a more
11 balanced instruction that basically leaves it up to the jury to
12 decide what weight to give that sort of evidence would be more
13 appropriate.

14 THE COURT: Do you have any more focused comments on
15 it beyond just leaving it out entirely?

16 MR. KRY: Just that, that it's already covered in the
17 earlier section of the draft.

18 THE COURT: Does the government have a view on that?

19 MR. MASTER: Yes, your Honor. This is a standard
20 direct and circumstantial evidence instruction in this
21 district. It is unobjectionable. It clearly states the
22 applicable law. So we think it's appropriate.

23 MR. KRY: In terms of specific, just to give you an
24 example, in the first paragraph the reference to it being a
25 rare criminal scheme where the participants write down or

FBJYSIL1

1 expressly state that they're acting with fraudulent intent --
2 it's those types of comments that could be read to imply to the
3 jury that that's what's going on here.

4 THE COURT: I looked at it carefully. I think it's
5 neutrally stated in terms of why. In particular, relevant to
6 state of mind, we really do have to look at circumstantial
7 evidence. So I hear you, but that objection is overruled.

8 Page 18.

9 MS. COHEN: Your Honor, we sent a letter. Do you have
10 it?

11 THE COURT: I got your letter.

12 MS. COHEN: I think it starts on insert the following
13 page 18, line 10, the requested language. I have an extra
14 copy, your Honor.

15 THE COURT: You want to insert on page 18, line 10.
16 So before we get to the third element.

17 MS. COHEN: Correct, your Honor.

18 THE COURT: "Finally, the government is required to
19 prove only that Mr. Silver acted with intent to defraud. The
20 government need not prove that any of those alleged to have
21 provided things of value to Mr. Silver acted with criminal
22 intent."

23 MR. KRY: I don't know that we object to that as an
24 incorrect statement of the law. It is, again, slanted. It
25 suggests that the government hasn't shown that other witnesses

FBJYSIL1

1 don't have that intent but that the jury should infer that
2 Mr. Silver does.

3 We have a corresponding edit here right at the end of
4 the same paragraph. If that instruction is added, we would
5 also want at least the second part of ours added which
6 essentially says conversely, even if you find that a third
7 party intended a payment as a bribe, you must still separately
8 determine whether Mr. Silver also had the same understanding --
9 the proposed instruction would be even if you find that a third
10 party intended a payment as a bribe --

11 THE COURT: Hang on a second. This is the comment
12 that starts with the payment in receipt of a bribe?

13 MR. KRY: Right. I was focusing on the second
14 sentence.

15 THE COURT: Does the government object to that?

16 MR. MASTER: Yes. We think that our proposal is a
17 correct statement of the law. Again, I think we're both in
18 agreement that this general principle should be added into the
19 charge.

20 So I'm looking here at the defense proposal. I think
21 our proposal focuses attention appropriately where it needs to
22 be for this charge, which is on Mr. Silver's intent, as opposed
23 to here where it's focused on a third party's.

24 It says that "Even if you find that a third party
25 intended a payment as a bribe," there needs to be no such

FBJYSIL1

1 finding. So I think in that sense, it's not a correct
2 statement of the law, and it unnecessarily directs the jury's
3 attention and inappropriately directs the jury's attention to
4 determining whether a third party intended to bribe.

5 THE COURT: Suppose what I do is I take the first
6 sentence of the defendant's proposed addition, that is, "The
7 payment and the receipt of a bribe are not interdependent
8 offenses because the donor's intent may be completely different
9 than the donee's."

10 I think I would change that to the giver's intent and
11 the receiver's. I think these are donations, and I think that
12 may pull you into political donation-type thoughts where we
13 don't want to go.

14 With that idea, getting rid of those words, then go to
15 the government's addition.

16 MR. KRY: Our preference would be just to give the
17 government's.

18 THE COURT: I have to say I kind of like your first
19 sentence though.

20 MR. KRY: We're withdrawing the proposal.

21 MS. COHEN: If they're withdrawing it, your Honor,
22 we're going with ours. We would prefer ours.

23 THE COURT: I appreciate that, but I'm still going to
24 consider that first sentence. I like the first sentence. I
25 think it may be helpful to the jury to understand that they

FBJYSIL1

1 really need to separate these two things.

2 I say that with all due respect, particularly if the
3 defense is going to be hammering in summation on what the
4 givers are intending.

5 The jury needs to understand that their focus has to
6 be on Mr. Silver and not the other -- the other evidence may be
7 circumstantial evidence of what he's thinking, but that's the
8 critical issue. That's what they have to determine. That was
9 why your first sentence was good.

10 MR. KRY: Right. We proposed it in connection with
11 the second sentence. Leaving the second sentence out, the idea
12 that they can't draw a negative inference about Mr. Silver's
13 intent if they conclude that a third party actually did act
14 with corrupt intent -- we think that the instruction is
15 incomplete without that piece of it.

16 THE COURT: Okay. I'll consider that.

17 Where is your next one? Where is the defense's next
18 change?

19 MR. KRY: We had a series of minor changes on the rest
20 of that page.

21 Does your Honor have the red line that we sent in?
22 These are all the same change. All we're proposing is that
23 where the instruction refers to an agreement to exchange
24 something of value from another person in exchange for an
25 official act, it's a better statement of the law and more

FBJYSIL1

1 consistent with what the allegation is here to refer to in
2 exchange for promise of an official act.

3 That's the way this is phrased in cases like Bruno and
4 Rosen as well as Ganim. So it's certainly not new language.
5 What it focuses the jury on is in a quid pro quo context.

6 It's not just an act going one way and a thing of
7 value going the other. There has to be some sort of agreement
8 or promise or commitment or understanding. So inserting that
9 word there captures that concept.

10 THE COURT: My problem is that in a be too precise to
11 capture that concept because you used lots of different verbs
12 there, "promised" being the most active of all of those.

13 MR. KRY: That is the word that Bruno and Rosen use
14 here, as well as Ganim.

15 THE COURT: Mr. Master.

16 MR. MASTER: I think we agree with your Honor that it
17 is just one of many ways in which this quid pro quo can
18 establish a promise might be one way. In Bruno, for example,
19 one definition in Bruno is --

20 MR. McDONALD: Your Honor, this same concept comes up
21 in a couple of our other suggested proposals. The idea that
22 all we're required to show is the defendant's intent. We can
23 show the defendant's intent through a number of different ways.

24 In some of the cases it's been shown through an
25 agreement. In other cases it's been shown through a promise.

FBJYSIL1

1 That's not a requirement. That's not an element of the
2 offense.

3 All we're required to do is show that the defendant
4 had a corrupt intent. There are a number of ways we can do it.
5 It constricts the way that we would argue the case and the way
6 that the jury could consider the case.

7 MS. COHEN: To the extent the word "promise" has
8 appeared in other cases, it's because in those cases under
9 those facts, there was a promise and an agreement.

10 MR. McDONALD: In fact the agreement cases, a lot of
11 them are conspiracy cases where the other's intent actually was
12 at issue.

13 THE COURT: In a lot of these cases it's also done
14 with winks and nods and never anything express. My problem
15 with saying that a bribe occurs when a public official accepts
16 something of value from another person in exchange for the
17 promise of an official act, that implies that there has to be
18 an express promise when there doesn't. That clearly is not the
19 law.

20 MR. KRY: That wasn't the intent of the instruction.
21 Whether explicit or implied, there still needs to be more than
22 just an intention to perform an official act.

23 It does have to be Mr. Silver's understanding that
24 there is an agreement or commitment or some sort of
25 understanding to exchange one thing for the other.

FBJYSIL1

1 That's what's absent there. If the right answer is to
2 say the promise of or a commitment to add a couple other words
3 along those lines, we wouldn't object to that.

4 Also on the case law, I don't think it was accurately
5 stated. In cases like Rosen and Bruno, the quote from Rosen is
6 that "An illegal quid pro quo we have previously defined as a
7 government official's receipt of a benefit in exchange for an
8 act he has performed or promises to perform in the exercise of
9 his official authority."

10 So that's not using "promise." It's just one example
11 of the way you can have a quid pro quo. It's a defining
12 element. That language is also directly from Ganim, and it's
13 phrased the same way in Bruno.

14 So I disagree that a promise is just one way you can
15 have a quid pro quo. There has to be some sort of promise or
16 commitment or agreement, whether express or implied, but it's
17 got to be there.

18 (Continued on next page)

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charge conference

1 MS. COHEN: The sentence the defense just read was an
2 "or" sentence which highlights that it is just one way. In
3 certain cases you may have an agreement and promise and not in
4 another case but there is no element required for the
5 government to show there is either an agreement or promise.

6 THE COURT: So the defense's request for, because I
7 was working off of the way you structured this portion of the
8 bribe and kickback charge and you -- I took out a lot of the
9 verbs that weren't particularly relevant here but at the end
10 you had, "so, a thing of value from another person in exchange
11 for a promise for or performance of an official act."

12 MS. COHEN: Your Honor, that's not what the government
13 would be required to show. We don't have to show it was a
14 promise for a specific official act.

15 THE COURT: Or. Or.

16 MS. COHEN: So this is --

17 THE COURT: This was the defense request. The
18 original defense request.

19 MS. COHEN: Promise of an official act, comma.

20 THE COURT: "In exchange for a promise, or exchange
21 of, an official act."

22 MS. COHEN: What page of the defense? Because I'm
23 looking at a different one.

24 THE COURT: 30. Their initial request to charge.

25 MS. COHEN: Ah. Okay. Thank you, your Honor.

FBJ5sil2

charge conference

1 MR. McDONALD: Page 30 of the defendant's original
2 request to charge?

3 THE COURT: Correct.

4 MS. COHEN: I'm sorry, your Honor. You're on page 30.

5 THE COURT: Of their original request to charge.

6 MS. COHEN: Correct.

7 MR. MASTER: Yes, your Honor. That's acceptable to
8 us.

9 MS. COHEN: It has the "or performance." Exactly,
10 your Honor.

11 THE COURT: So I will make that change and the
12 parallel change will be in the definition of a kickback.

13 MR. KRY: Right. And then there is another one on
14 line 22 as well.

15 THE COURT: Okay, so that also takes in -- the
16 government's request is on line 20 to strike "relationship,"
17 correct?

18 MS. COHEN: Correct, your Honor.

19 MR. MASTER: Correct, your Honor.

20 MS. COHEN: It comes also on page 18, line 19.

21 MR. KRY: Yes.

22 THE COURT: Where?

23 MS. COHEN: Page 18, line 20.

24 THE COURT: I have it there.

25 MS. COHEN: Do you want all the relationship ones?

FBJ5sil2

charge conference

1 THE COURT: No. It is easier for me if we take it
2 page by page. So, kickback will have a parallel change. So
3 then the defense is saying that down on line 20, after defining
4 *quid pro quo*, it would be the government must prove that a
5 bribe or kickback was provided to Mr. Silver, directly or
6 indirectly, in exchange for a promise of or performance of
7 official action.

8 MS. COHEN: Correct. And the other change we wanted
9 instead of "the government must prove that a bribe or a
10 kickback was provided to Mr. Silver," we requested "was sought
11 or received by."

12 THE COURT: Any objection?

13 MR. KRY: We don't object to that.

14 THE COURT: Okay. Page 19.

15 MR. KRY: On lines 18 to 10 there is a statement that
16 says, "This element can be proven if you find that Mr. Silver
17 would have taken the same action even if no bribe or kickback
18 had been paid." The defense objects to that just as not a
19 correct statement on the law, at least not on these facts.
20 Some of the evidence in the case, situations, for example, like
21 with the methadone clinic where there was abundant evidence
22 that Mr. Silver was already planning to oppose that project
23 when he happened to get a call from one of the developers
24 interested in it. We don't see any authority from the Second
25 Circuit that suggests that that would be sufficient to

FBJ5sil2

charge conference

1 establish a *quid pro quo* and we also didn't see any Second
2 Circuit authority document phrasing so we think that sentence
3 should be taken out.

4 MR. McDONALD: Your Honor, there is lots of authority
5 supporting that. The Coyne case, the Biaggi case.

6 THE COURT: I thought I had seen it somewhere.

7 MR. McDONALD: That motivation that is corrupt in part
8 does not insulate participants in an unlawful transaction from
9 criminal liability. And then there is the *City of Columbus v.*
10 *Omni Outdoor Advertising* case that's been included in our
11 various motions to dismiss briefing which is a 1991 case from
12 the Supreme Court. "A mayor is guilty of accepting a bribe
13 even if he would have and should have taken, in the public
14 interest the same action for which the bribe was paid." There
15 is ample authority for it.

16 MR. KRY: So, the first line of cases that the
17 government referred to is really addressing a separate issue.
18 We are not talking here about mixed motives, the question is in
19 a situation like the methadone clinic where Mr. Silver was
20 obviously not only planning but in the process of opposing it
21 anyway, if that course of conduct wasn't in any way affected by
22 the fact that his chief of staff got a call from one of the
23 developers, how can that be a basis for a *quid pro quo*? And
24 that's not a issue of motive, it is an issue of being no
25 causation at all.

FBJ5sil2

charge conference

1 The second point on *Omni Outdoor*, the language quoting
2 there was not the holding of the case. The case addresses
3 completely different issues and so that language doesn't decide
4 the issue in that case and it hasn't been adopted in any other
5 Second Circuit case so we are noting our objection to that. I
6 don't think it is an accurate statement of the law, especially
7 on these facts.

8 MR. McDONALD: And just one final point on this, your
9 Honor. The instruction doesn't say "will be proven," it says,
10 "can be proven."

11 THE COURT: Right.

12 MR. McDONALD: Right.

13 THE COURT: Okay. I will take a look at that
14 authority and we will consider your objection.

15 MR. McDONALD: Just for the record, your Honor, there
16 are a number of other out-of Second Circuit cases. This is an
17 unbroken line of authority; *United States v. Holzer* from the
18 Seventh Circuit 816 F.2d 304.

19 THE COURT: Give me the cite of the Supreme Court.

20 MR. McDONALD: 499 U.S. 365; and it does arise in a
21 slightly different context but it makes this point and cites
22 lower court authority.

23 THE COURT: Just viscerally it makes sense that just
24 because you would do the same thing, if you take a bribe for it
25 but you are going to do the same thing anyway, that doesn't

FBJ5sil2

charge conference

1 mean it is not a bribe, it just means the person who pays the
2 bribe was an idiot.

3 MR. KRY: I don't see how a jury could find the *quid*
4 *pro quo* relationship, though, if the fact that the developer
5 who made a call to your chief of staff had nothing to do with
6 what Mr. Silver went on to do in relation to the project. Our
7 view would be that would not be the basis for establishing a
8 *quid pro quo*.

9 THE COURT: If that were the be all and end all of the
10 government's case I would be pondering this a lot harder but
11 there is a lot more going on in this case. But, I understand
12 your point. Okay.

13 MS. COHEN: If we can go back? I think we had a
14 suggested change on page 19 higher up on line 2, it is a
15 carryover sentence.

16 It starts on page 18, line 23: "The government does
17 not have to prove that there was an express or explicit
18 agreement that official actions would be taken or that any
19 particular action would be taken in exchange for the bribe or
20 kickback so long as it proves that" -- and your suggested
21 charge says "there was an understanding." We propose to say
22 that Mr. Silver intended to perform. It is Mr. Silver's intent
23 that matters.

24 MR. KRY: Right. So, we object to that one.

25 MS. COHEN: Do you want me to finish the sentence off?

FBJ5sil2

charge conference

1 So it would read, our suggested language would say: "So long
2 as it proves that Mr. Silver intended to perform official
3 actions" and then instead of --

4 THE COURT: In exchange.

5 MS. COHEN: We suggested "as the opportunities arose
6 in exchange." Instead of "would be taken."

7 MR. MASTER: Official action as opportunities arose
8 would modify official action.

9 MS. COHEN: As the opportunities arose in exchange for
10 the -- instead of the payment we wrote -- the money or property
11 given, directly or indirectly, to Mr. Silver.

12 THE COURT: Why couldn't it just say in exchange for
13 the bribe or kickback?

14 MR. McDONALD: Okay.

15 MS. COHEN: That's fine, your Honor.

16 THE COURT: Okay.

17 You object. Tell me why.

18 MR. KRY: Right. So I mean, the essence of a *quid pro*
19 *quo* is there has to be some kind of agreement, understanding,
20 or commitment. The fact that Mr. Silver intends to do
21 something and that the other party intended to do something
22 else doesn't establish that element. If the government's
23 objection, which is what I understand to be, is that the focus
24 has to be on Mr. Silver's understanding of the situation, I
25 think the right way to fix that would be to change the end of

FBJ5sil2

charge conference

1 this instruction so that it says: "So long as it proves that
2 Mr. Silver understood that there was an agreement to perform
3 official actions in exchange for the money or property given,
4 directly or indirectly, to Mr. Silver." But there has to be
5 something in this instruction that gives that essential element
6 of a *quid pro quo* which is an agreement, understanding, or
7 commitment.

8 MS. COHEN: That's the problem, is that the agreement
9 is not -- doesn't have to be -- they both don't have to have a
10 meeting of minds element.

11 THE COURT: It is not a contract.

12 MS. COHEN: And it is not a conspiracy.

13 THE COURT: Right.

14 MR. KRY: It is the case that you can have situations
15 where Mr. Silver thinks there is a meeting of the minds and the
16 other party doesn't and that's the Anderson line of cases that
17 says it is not a defense that the public official erroneously
18 believed that he was taking bribes but the public official
19 still has to believe that there was a *quid pro quo*. He has to
20 understand that there was some kind of arrangement or agreement
21 or understanding to exchange one thing or the other and so, in
22 that, he has to believe that there was a meeting of the minds.
23 That's absolutely the law.

24 THE COURT: But isn't that captured in what the
25 government wants? So, it would read: The government does not

FBJ5sil2

charge conference

1 have to prove that there was an express or explicit agreement
2 that official actions would be taken or that any particular
3 action would be taken in exchange for the bribe or kickback so
4 long as it proves that Mr. Silver intended to perform official
5 actions in exchange for the bribe or kickback -- or would
6 perform official actions as the opportunities arose in exchange
7 for the bribe or kickback. It seems to me the "exchange" verb
8 captures the *quid pro quo* requirement and the problem with
9 using the word "agreement," despite the fact that I had it in
10 there, or understanding, is that it suggests -- like a
11 requirement of a conspiratorial agreement which is not
12 required.

13 MR. KRY: Well, the conspiratorial agreement would be
14 that they have to prove that both parties shared that
15 understanding and that's not what we are asking for. What we
16 do think there has to be is that Mr. Silver has to understand
17 that there was a meeting of the minds. It is not enough that
18 Mr. Silver intended to perform acts in exchange for something.
19 He has to also believe that the other person had, you know,
20 formed an agreement, a corrupt agreement to do that. It is
21 that piece of it that's lost when you take this out. So, --

22 THE COURT: Tell me again what case you think holds
23 that? He had to believe that the other side believed --

24 MR. KRY: It just seems like it is in the -- that is
25 the essence of what *quid pro quo* is so in terms of case law,

FBJ5sil2

charge conference

1 the way it is spelled out *Ganim* certainly has language
2 explaining that -- and this comes back to the discussion we
3 were having earlier about there having to be some kind of
4 promise or the like.

5 So, for example, on page 144 of *Ganim* there is
6 language about knowing that the payment was made in return for
7 official acts so the idea there is that the public official has
8 to know that the other person's expectation is that there is an
9 exchange here. There is also language earlier on page 144
10 about how the official must know that payment is offered in
11 exchange for a specific requested exercise of his official
12 power in order to violate the statute. So, I do think the
13 Second Circuit case law shows that the public official has to
14 know that the benefit that's being conferred here is part of
15 some agreement or understanding and it doesn't have to be
16 express but it has to be there. That's what a *quid pro quo* is.

17 MR. McDONALD: Your Honor, while you are taking a look
18 at that, *Ganim*, again was a conspiracy case. We cited in our
19 letter -- or there was a conspiracy charge in the case. We
20 cited in our letter a number of different cases which make
21 clear that the offer and the acceptance of a bribe or the
22 intent of the two parties, that these are not interdependent
23 crimes, that the element only requires where there is no
24 conspiracy for the government to show a corrupt intent on one
25 side of the transaction. The other side's intent could be

FBJ5sil2

charge conference

1 relevant to the extent it sheds light on the defendant's
2 corrupt intent as we have talked about throughout the various
3 motions but there is no requirement at all that there be an
4 agreement, that there be a mutual understanding, that there be
5 a meeting of the minds. All that's required is that the
6 defendant have a corrupt intent himself.

7 MR. KRY: We don't disagree with any of that. That's
8 just not the issue here. If it is the case that the person
9 paying the bribe has an understanding that there is no *quid pro*
10 *quo* and the person receiving it has an understanding that there
11 is an agreement, then that's still enough. The issue here is
12 that the defendant has to have that understanding, that there
13 is a *quid pro quo* or an agreement or a commitment.

14 THE COURT: But it is an exchange.

15 MR. KRY: But it is more than that because the
16 exchange doesn't connote the fact that there is an agreed upon
17 exchange. An exchange could be coincidental that one thing
18 went one way and one thing went the other way. That doesn't
19 get you all the way there for what is a *quid pro quo* which is
20 an understanding or agreement that the one thing is actually
21 going to be a *quid* for the other person's *quo*.

22 MR. McDONALD: Your Honor, the language that we quoted
23 in our letter from *Bruno* says the key inquiry is, "whether an
24 intent to give or receive something of value in exchange for an
25 official act has been proved." There is no additional

FBJ5sil2

charge conference

1 requirement on top of the exchange.

2 THE COURT: Okay.

3 MR. KRY: And I am familiar with the language of *Bruno*
4 but it is not obviously addressing the specific issue. That is
5 reading in elements to a point that the Court wasn't
6 considering. I think this language from *Ganim* makes clear to
7 the contrary where it is addressing the elements of a *quid pro*
8 *quo* and not the elements of conspiracy, notwithstanding what
9 the government said, is that the defendant has to know that
10 this agreed upon exchange exists.

11 THE COURT: Okay. I will take a look again at *Ganim*.
12 So you want this. What do you want added into this?

13 MR. KRY: So, we didn't object to the way Court
14 phrased it but bearing in mind the government's objection, I
15 think the correct way to address the problem that they want to
16 fix would be to say: So long as it proves that --

17 THE COURT: That Mr. Silver intended to perform.

18 MR. KRY: That Mr. Silver understood there was an
19 agreement to perform official actions as the opportunities
20 arose.

21 MS. COHEN: Your Honor, that would lend the same
22 problem, that both sides of the coin had to have the same
23 agreement.

24 MR. KRY: No, no, it was that Mr. Silver understood
25 there was a agreement, not that there was an agreement, that he

FBJ5sil2

charge conference

1 understood the agreement. So, it does not raise the issue you
2 are objecting to.

3 MS. COHEN: I think the "in exchange" language takes
4 care of the problem.

5 MR. KRY: It doesn't because "in exchange" can mean
6 one thing had to go one way at the same time another thing goes
7 another way. It is the meeting of the minds, or at least in
8 Mr. Silver's view of the world that is essential here.

9 MR. MASTER: He has to intend for it to be an
10 exchange, that's what takes it out of that coincidence world,
11 it is that he has to intend for it to be an exchange.

12 MS. COHEN: Right. So it is not a coincidence because
13 Mr. Silver intended it to be an exchange.

14 THE COURT: Intent to perform in exchange for.

15 MS. COHEN: Correct, your Honor.

16 MR. KRY: But I still don't -- that doesn't get the
17 idea that there is an agreement or a meeting of the minds. I
18 mean, intending to exchange could just mean I intend to give
19 one thing back to you at the same time you give something back
20 to me. That doesn't capture the idea that there was a
21 commitment or a shared understanding.

22 THE COURT: No, but it is an intent to perform in
23 exchange for.

24 MR. KRY: Maybe my concern is that the jury could read
25 that differently and I think to adequately capture the concept

FBJ5sil2

charge conference

1 there needs to be some kind of understanding or agreement there
2 and that understanding phrase wasn't in the Court's original
3 instruction. So, we would be happy with that if you are trying
4 to address the government's concern that I want to fix that the
5 way we propose fixing it.

6 THE COURT: I don't like your fix. I'm not saying
7 entirely that -- I want to look at this because I'm not
8 convinced that this doesn't convey what you want to convey and
9 I am willing to consider other changes of language, but what
10 you just said off the top of your head I don't like because I
11 don't think it reads well. I don't think it's going to be easy
12 for the jury to understand what is intended.

13 Okay, what is next?

14 MR. KRY: The next one I think we actually had an
15 agreed one which is deleting the last sentence in the next
16 paragraph.

17 THE COURT: What page, paragraph, line?

18 MS. COHEN: I'm on page 19, line 5.

19 MR. KRY: Right at the end there is a sentence about
20 campaign contributions at the end.

21 MS. COHEN: Before we get to that?

22 THE COURT: Page 19, line 5.

23 MS. COHEN: "It does not matter who initiated the *quid*
24 *pro quo* relationship," we ask that relationship be taken out.

25 MR. KRY: We don't object to that.

FBJ5sil2

charge conference

1 THE COURT: Okay, and you don't like -- and I agree
2 with you, the last sentence should come out that is on line 20.

3 MS. COHEN: We would like a sentence before that to be
4 inserted. We agree that that sentence should come out and we
5 have proposed a sentence to come before because without a
6 sentence saying that the campaign contributions can be relevant
7 is evidence to Mr. Silver's intent it looks like they're not
8 relevant to anything.

9 THE COURT: So, I like the beginning of the
10 government's sentence. I didn't like the end of it. I liked
11 the first clause.

12 MS. COHEN: The government does not allege that the
13 campaign contributions made by Glenwood were unlawful.

14 THE COURT: Period.

15 MS. COHEN: We think it is necessary to add something
16 about what they can consider it for which the government
17 contends is evidence relevant to Mr. Silver's intent in that
18 the reason or one of the reasons they could conclude -- they
19 could not but could conclude -- that Mr. Silver approached
20 Glenwood is he knew how dependent they were on the State as
21 evidenced by the campaign contributions. And one of the
22 reasons that Glenwood's state of mind is relevant is because
23 they were so dependent on the State which is evidenced by the
24 campaign contributions. But that evidence can be used as
25 relevant which is why, to Mr. Silver's intent, we are not

FBJ5sil2

charge conference

1 saying it is dispositive but the jury should be told they can
2 consider that evidence. Otherwise, the way it reads it says
3 they can't consider it for anything.

4 MR. SHUR: Judge, if you remember correctly, the
5 reason the government wanted this evidence in -- we opposed it
6 initially and the Court's ruling as to the limited purpose for
7 which the jury could consider it was with respect to Glenwood's
8 state of mind that Albany and New York State was important to
9 Glenwood, this is the first time we are hearing that it is
10 being -- it was offered for Mr. Silver's state of mind.

11 THE COURT: That was also my recollection, that it
12 intended to prove why Glenwood would get sucked into this
13 because they were so dependent on the largess of government as
14 evidenced by the fact that they were a major contributor to the
15 New York State government --

16 MS. COHEN: -- checks which also plays into the side
17 letter. I didn't mean to overstate the original ask back in
18 1995 to Mr. Litwin. So, focusing on Glenwood's state of mind
19 which also relates to the side letter, of course.

20 MR. GOLDSTEIN: We did make both arguments that it was
21 relevant both to Glenwood in terms of why would Silver go to
22 Glenwood, of all developers, to propose this arrangement and to
23 propose continuing this arrangement is because he knew, among
24 other reasons, because of the campaign contributions, that
25 Glenwood was highly dependent on state action.

FBJ5sil2

charge conference

1 MR. KRY: So, for the defense we would be okay with
2 consider such evidence as relevant to Glenwood's state of mind.
3 That was the basis on which the evidence came in. To go beyond
4 that and say relevant to Mr. Silver's intent, that was not the
5 basis on which it came in and even if there were some theory by
6 which the jury could go from Glenwood's state of mind to
7 Mr. Silver's intent, just phrasing it like this reads kind of
8 like a road map about what inference the government wants the
9 jury to draw. So, our preference would be the Court's original
10 inclination which is to end it after "were unlawful." But if
11 something else were to be added it should be on the basis on
12 which the evidence actually came in and not some other theory.

13 MS. COHEN: Your Honor, maybe we can consider THIS and
14 we can propose some other language that addresses the concern?

15 THE COURT: Okay.

16 MS. COHEN: It is not just that they can't consider
17 it. They can consider it as evidence of something but since
18 the case is not focused on Glenwood's intent -- but, we will
19 think about that, your Honor.

20 THE COURT: It doesn't focus on Glenwood's intent but
21 Glenwood's intent is relevant.

22 MS. COHEN: It is relative to Silver's intent because
23 the side letter --

24 THE COURT: I hear, you but there is a long string
25 that you have to go to get there and I'm not prepared to use

FBJ5sil2

charge conference

1 the charge to get them there.

2 MR. SHUR: Judge, I don't have the transcript in front
3 of me at the moment but I believe your Honor gave a limiting
4 instruction at the time that evidence came in to the jury.

5 THE COURT: I did. I did.

6 MR. SHUR: Okay.

7 THE COURT: But I have this entire paragraph in for
8 the defendant so if the defendant doesn't like the paragraph,
9 tell me. I gave a limiting instruction at the time. I don't
10 think it is necessary but I thought you would like it. And I
11 have done so little that you like.

12 MS. COHEN: The government doesn't see it that way,
13 just so you know --

14 MR. MOLO: Don't sell yourself short, Judge.

15 MS. COHEN: -- neither does the defense.

16 MR. COHEN: I am glad you are thinking about it,
17 Judge.

18 THE COURT: So think about it.

19 MS. COHEN: If they don't want it at all that's fine
20 with us.

21 THE COURT: The government doesn't want it so
22 recognizing that I will definitely take the first clause and I
23 will consider kind of a second clause that somehow or another
24 tells them that they can consider it generally, it is
25 circumstantial evidence of people's intent or something. But,

FBJ5sil2

charge conference

1 if you would rather not have that, I will strike the entire
2 paragraph.

3 MR. MOLO: All right.

4 THE COURT: Because I don't think it is necessary.

5 MR. COHEN: Can we confer?

6 THE COURT: Absolutely. But you need to let me know
7 tomorrow by noon.

8 MR. COHEN: By what time, your Honor?

9 THE COURT: Noon.

10 MR. COHEN: Good.

11 THE COURT: Okay. Next?

12 MR. KRY: The government I think had an issue with
13 lines 21 to 23 on that page.

14 THE COURT: Okay.

15 MS. COHEN: I just want to orient the court, we wanted
16 to strike, on page 19, starting on line 21 through page 20
17 ending at line 2.

18 THE COURT: This was trying to get to the basic
19 argument that the defense is making which is it is not enough
20 that money goes with some kind of inchoate hope that things are
21 going to be done on the behalf of the provider because that
22 really is a campaign contribution, that's why people give
23 money. Hope springs eternal that a politician will do what you
24 want. So, that's not enough. So that's what that was trying
25 to get to.

FBJ5sil2

charge conference

1 MS. COHEN: I think by adding our sentence above, that
2 we don't allege that they're unlawful, that might take care of
3 it.

4 MR. KRY: But this paragraph, I don't read, as
5 addressing campaign contributions. This is a different topic
6 now.

7 THE COURT: It is really sort of -- it is that there
8 had to be a *quid pro quo*, not just that you are giving the
9 money and hoping that you are getting goodwill. Sort of pure
10 goodwill is not enough. Right? I think everybody agrees to
11 that. There has to be more than that.

12 MS. COHEN: Just where it is inserted, then, because
13 it is the thus which we thought modified the campaign
14 contributions.

15 THE COURT: It was. It was playing off the campaign
16 contributions.

17 MS. COHEN: Okay, that's why we thought our sentence
18 dealt with that issue but if this is a different issue on
19 goodwill --

20 MR. KRY: Strike the thus. We would certainly be fine
21 with that.

22 We also had a proposal on this paragraph too.

23 THE COURT: Okay.

24 MR. KRY: There were two sentences and this will sound
25 familiar because they're the ones that we suggested adding back

FBJ5sil2

charge conference

1 in the initial charge at the outset of the case. The language
2 that we want, and this is a direct quote from *Ganim*, is: This
3 element also is not proved if the benefit is intended to be or
4 is accepted as an effort to buy favor or generalized goodwill
5 from a public official who either is, has been, or will be at
6 some later time in a position to act favorably to the giver's
7 interest, nor is this element proved if a public official
8 accepts a personal benefit if his or her intent in taking those
9 items is solely to cultivate a relationship with the person or
10 persons who provided them.

11 This is not only a direct quote from *Ganim*, this is an
12 instruction that was given in this case that the Second Circuit
13 then said was an accurate statement of the law and it is these
14 two sentences that really get across the concept of generalized
15 goodwill isn't enough, cultivating a relationship isn't enough.
16 So, if there is any instruction in this entire charge
17 conference that the defense believes is critical to accurately
18 conveying the law to the jury, this is it.

19 THE COURT: So, why doesn't the first sentence that's
20 in there say the same thing but in a more layperson way,
21 recognizing that the audience for Second Circuit decisions is
22 us and the audience for a jury charge is the jury.

23 MR. KRY: Because there are specific concepts in the
24 *Ganim* instruction about generalized goodwill and cultivating a
25 relationship that aren't in the one that's phrased. We don't

FBJ5sil2

charge conference

1 have any objection to the first sentence. It is certainly also
2 an accurate statement of the law but it really is that concept
3 of generalized goodwill as distinct from a *quid pro quo*
4 agreement that is essential to get across to a jury in a case
5 like this.

6 Also, again, it is not a matter of what the audience
7 for the Second Circuit is. The Second Circuit was quoting an
8 instruction that was given to the jury in *Ganim* so it not only
9 believed that that wasn't a correct statement of the law, it
10 believed that it was something the jury should have been told.

11 THE COURT: But not necessarily in those exact words.

12 MR. KRY: The concepts that need to come out are the
13 idea of generalized goodwill as opposed to *quid pro quo* and
14 cultivating a relationship.

15 MS. COHEN: Your Honor, if we can just address the
16 generalized goodwill on a more broad basis?

17 MR. MASTER: Your Honor, we are aware of many cases,
18 in fact many cases recently in public corruption cases in this
19 district, Smith, Stevenson, Annabi and Seabrook did not have
20 this generalized goodwill instruction. And similarly, they
21 involved public officials who were on trial for seeking or
22 accepting bribes. So, *Ganim* was not indicating that that was a
23 necessary element of any charge on honest services fraud and
24 those are more recent cases.

25 THE COURT: Have they gone up to the Second Circuit

FBJ5sil2

charge conference

1 yet?

2 MR. MASTER: I believe that Annabi --

3 MS. COHEN: This issue didn't go up to the Second
4 Circuit yet in those cases but even in *Ganim* --

5 MR. MASTER: It was in *Ganim* that instruction was
6 given.

7 MS. COHEN: In the District Court but it is not that
8 that's part of the instruction that was affirmed by the Second
9 Circuit. The Second Circuit affirmed other parts but it wasn't
10 specifically that part of the instruction that they were
11 addressing.

12 MR. KRY: Quite the contrary. The quite the contrary.
13 They quoted this instruction and the Second Circuit
14 said that's an accurate statement of the law so this was
15 specifically passed on. And the government hasn't shown
16 whether or not this instruction was given in other cases. We
17 don't know whether it was proposed. We don't know whether it
18 was overruled.

19 MR. MOLO: Or whether the evidence supported it and
20 that is the issue here, Judge.

21 MR. MASTER: The other issue with the instruction is
22 that, in *Ganim*, the defense proposed instruction that as in
23 *Ganim* it involved a conspiracy. So, here, the second sentence
24 is addressed to defendant's intent. That is in the defendant's
25 proposed instruction.

FBJ5sil2

charge conference

1 THE COURT: I'm sorry. The second sentence of what
2 the defendant is proposing?

3 MR. MASTER: The defendant has proposed two sentences.
4 It says: Not improved that the benefit intended to.

5 THE COURT: I'm sorry. Say that again.

6 MR. MASTER: So the proposed instruction is two
7 sentences, right?

8 THE COURT: Yes.

9 MR. MASTER: It says: If it is intended to be an
10 effort to buy favor or generalized goodwill. That goes to the
11 intent of the payor, right? And the second sentence addresses
12 the intent of the public official. For the reasons we have
13 just been discussing the charge should be focused on the
14 intent.

15 MR. KRY: We can fix that. We can fix that. We would
16 just change it to this element also is not proved if the
17 benefit is understood to be an effort to buy favor or
18 generalized goodwill. I mean, that takes care of that problem.

19 MS. COHEN: I don't think that fixes the problem.

20 MR. KRY: Why not? It is a question of whether
21 Mr. Silver understood that this was just generalized goodwill
22 or part of a *quid pro quo*.

23 MS. COHEN: But that Mr. Silver understood, for
24 example, Glenwood's intent to establish goodwill and that is
25 focusing on his understanding of their intent which is not what

FBJ5sil2

charge conference

1 is at issue here, it is his intent, not his understanding of
2 their intent.

3 MR. KRY: Absolutely. If Mr. Silver didn't understand
4 that Glenwood was providing this as part of a *quid pro quo* then
5 he can't be found guilty. This is the same issue we were
6 talking about before. Mr. Silver has to understand that there
7 is a *quid pro quo* and that includes understanding that Glenwood
8 had a particular intent when he was making those payments that
9 there was something that was part of a *quid pro quo* and not
10 just payments made to curry favor or build-up generalized
11 goodwill.

12 So, I hear the government's point the way first
13 sentence is phrased but that's easily fixed just by changing
14 the second sentence -- or by changing the second part of the
15 first sentence to: If the benefit is understood to be an
16 effort to buy favor or generalized goodwill. That's an easily
17 fixed issue, it is just the concept of generalized goodwill
18 that needs to stay in there.

19 MS. COHEN: Just to be clear, in *Ganim* they weren't
20 focused on the propriety of that part of the instruction, they
21 were focused on the benefits part of the instruction. So it is
22 not that they were affirming specifically that you needed to
23 have this goodwill in an instruction. That was not what was at
24 issue in the Second Circuit. The District Court did give it
25 but it is not -- the Second Circuit wasn't specifically

FBJ5sil2

charge conference

1 affirming that.

2 THE COURT: But in this case part of the defense
3 theory is that there was not a bribe because what the
4 developers were doing, particularly, put Taub to one side, they
5 think it is not as persuasive there. What the developers were
6 doing was just trying to curry favor.

7 MR. McDONALD: And that's not an element of the
8 charges against Mr. Silver. We have to show that the defendant
9 had a corrupt intent and engaged in a *quid pro quo* with that
10 corrupt intent. The *quid pro quo* and the exchange comes out of
11 the *quid pro quo*. There is no additional requirement in any of
12 these cases that there be an agreement or an understanding on
13 top of that in your honest services fraud context.

14 In the extortion context the counter --

15 THE COURT: I'm sorry. Go ahead.

16 MR. McDONALD: The counter-parties intent then does
17 become part of the charged conduct in a slightly different way
18 which we talk about in the extortion context. The extorted
19 parties motivation has to be -- the extorted party, we then
20 have to show, has to be motivated by the public official's
21 position.

22 THE COURT: Right.

23 MR. McDONALD: But that's different from in an honest
24 services fraud context the government being required to show
25 that the counter-party also shared either a corrupt intent or

FBJ5sil2

charge conference

1 even that the defendant understood the counter-party to share a
2 corrupt intent. That's just not what the cases say. We have
3 to show that he intended to have an exchange, that's what *quid*
4 *pro quo* means, this in exchange for that. That's what *Skilling*
5 says, that's what the cases that followed *Skilling* say. There
6 is nothing else based into that that there needs to be separate
7 agreement on top of the exchange which is what is *quid pro quo*,
8 it is bribery or kickbacks, *quid pro quos*, that's --

9 MR. KRY: This issue doesn't depend on whether or not
10 they're right about that because regardless of whether you
11 think that Mr. Silver has to understand that the other party
12 had a certain intent, it still matters whether this is just a
13 payment that either party was just trying to build-up goodwill
14 or cultivating a relationship or if it was a *quid pro quo*
15 exchange. So, it is that specific language, the generalized
16 goodwill, that needs to come out somehow regardless of how it
17 is phrased.

18 THE COURT: But it has to be in his head.

19 MR. KRY: His understanding.

20 MR. McDONALD: With respect, your Honor.

21 THE COURT: But not his understanding of what's in
22 their head, it has to be what is in his head.

23 MR. KRY: He at least has to understand what is in
24 their head to the extent of believing there was an exchange
25 going on. If Mr. Silver believes that Glenwood didn't have any

FBJ5sil2

charge conference

1 intent to have any kind of a exchange how can there be a *quid*
2 *pro quo* when one party doesn't think there is a *quid pro quo*
3 and the other party doesn't think there is a *quid pro quo*. No
4 case has ever held that that's bribery.

5 THE COURT: No.

6 MR. KRY: So, Mr. Silver at least has to have the
7 understanding that the other party is transferring things of
8 value because there is some kind of meeting of the mind or *quid*
9 *pro quo*.

10 THE COURT: In exchange for.

11 MR. KRY: And maybe -- whether or not it is adequately
12 covered by that it is at least covered by that so it is not
13 correct to say that you can't look at what Mr. Silver
14 understood the intent or the actions of what the other people
15 in the transaction were doing because that's inevitably bound
16 up in what you are deciding -- there was an exchange.
17 Mr. Silver has to believe there was an exchange and that
18 requires not only what Mr. Silver thought about what he was
19 doing but also what Mr. Silver thought about what the other
20 people were doing, and if Mr. Silver thought that they were
21 just providing these things of value because it was their way
22 of building up generalized goodwill then the jury can't convict
23 and that's true regardless of what you think about any of the
24 other issues that we have been talking about today.

25 MR. McDONALD: That's just not the case. There is no

FBJ5sil2

charge conference

1 additional requirement that there be some agreement or meeting
2 of the mind or mutual understanding when we are talking about a
3 *quid pro quo* relationship. The defendant has to have a corrupt
4 intent when entering the exchange. There has to actually be
5 the exchange and -- well, there doesn't have to be the exchange
6 but in the hypothesis we are talking about where there is an
7 exchange, if the defendant accepts his half of the exchange
8 with the corrupt intent, that's sufficient. There is no --
9 there is no additional requirement on top of that that the
10 counter party have a specific intent or that the defendant
11 understand that he have the specific intent.

12 THE COURT: There are cases that say expressly that
13 you can have a disconnect with an innocent bribe giver and a
14 guilty bribe taker.

15 MR. KRY: Absolutely. That's Anderson. We are not
16 disputing that.

17 THE COURT: That says that it is not the case -- your
18 theory is they could be wrong.

19 MR. KRY: Sure. Yes.

20 So, if Dr. Taub was making payments to build-up -- I
21 believed he was making payments to build-up generalized
22 goodwill and Mr. Silver erroneously thought that Dr. Taub was
23 making payments as part of a *quid pro quo* arrangement, what
24 Anderson said is out of luck.

25 THE COURT: That's sufficient.

FBJ5sil2

charge conference

1 MR. KRY: But that is totally different from Dr. Taub
2 having one state of mind and Mr. Silver believing that Taub was
3 making payments to build-up goodwill. That's absolutely not
4 sufficient and that's why you need this instruction.

5 THE COURT: All right. I think we have beat this to
6 death. I will take a look at *Ganim*.

7 MR. McDONALD: The only additional things we are
8 talking about as to whether they are connected or not, and I
9 believe Mr. Kry said they are not, we think they are connected
10 because the generalized goodwill instruction really makes sense
11 where the giver's intent is the one that matters. You don't
12 see --

13 THE COURT: Right.

14 MR. McDONALD: -- you don't see them very often, a
15 public official accepting money to get generalized goodwill or
16 accepting a benefit that -- it doesn't make sense in that
17 context. It makes sense where the giver's intent is at issue.

18 THE COURT: Okay.

19 MR. McDONALD: Which is why we object to it.

20 THE COURT: Okay. Page 20.

21 MR. KRY: We don't have anything on page 20.

22 THE COURT: Government?

23 MS. COHEN: No. We are fine. We are good until page
24 22.

25 THE COURT: 21.

FBJ5sil2

charge conference

1 MR. KRY: Bottom page 21, line 23, this is an issue
2 that was covered by the order on the motion to dismiss but we
3 wanted to preserve our objection that for there to be extortion
4 it has to be the case that Mr. Silver obtained property not due
5 to him as a public official and deprived someone of that
6 property. Under *Sekhar* there has to be both a deprivation and
7 obtaining of property.

8 THE COURT: So, here is my issue on that and this also
9 went to -- I can't remember whose requested charge which got
10 into charging the jury on that issue. It seems to me that that
11 is a question of law of whether what is being -- what the
12 property was is in fact property that was capable of being
13 extorted and that was why I essentially charged them that they
14 acquit if they find only the referral of patients because
15 that's not property but believes, which is what their theory
16 is, are both transferable and property.

17 MR. KRY: That's a separate issue and we have some
18 other objections on that.

19 THE COURT: Okay.

20 MR. KRY: This is a slightly different point which is
21 just that right now this charge requires only that there be an
22 obtaining of property under *Sekhar* there has to be both
23 obtaining and deprivation and again, in all candor, you ruled
24 against us on the motion to dismiss. I want to make our record
25 that we are objecting to that.

FBJ5sil2

charge conference

1 THE COURT: Okay. So.

2 MS. COHEN: So we don't have to address it?

3 THE COURT: No.

4 MS. COHEN: Okay.

5 THE COURT: That's the issue of whether that -- I
6 remember now. It is not clear that the Supreme Court really
7 intended that, to them, to become a new element or sub-element
8 of that as opposed to describing what is property that is
9 capable of being extorted.

10 MR. KRY: Right. And we read the passage differently
11 but obviously we respect the Court's ruling.

12 THE COURT: Okay.

13 MR. KRY: The next page, lines 1 through 3.

14 MS. COHEN: You are on page 22?

15 MR. KRY: That's the one.

16 Two references here to Mr. Silver's official position.
17 It says that the property was given to Mr. Silver with the
18 consent of giver and because of Mr. Silver's official position
19 and that Mr. Silver knew that the property was given because of
20 his official position. That's not an accurate statement of
21 what you need for a *quid pro quo*. It has to be an exchange for
22 an official act.

23 THE COURT: I thought this went to the extortion
24 count.

25 MR. KRY: It does, but extortion and honest services

FBJ5sil2

charge conference

1 fraud both have a *quid pro quo* requirement and they're the same
2 in this respect, there has to be property given up because of
3 Mr. Silver's -- we said promise of an official act, but in
4 exchange for an official act would also be fine here too.

5 It is the point that it is not just his status as
6 public official. For it to be *quid pro quo* there has to be
7 official act on the other side and I would note, too, that on
8 this one we talked about this exact same issue on the
9 preliminary instructions and the Court adopted this change and
10 so this is really just conforming the final instructions to the
11 one that is already given.

12 MR. McDONALD: Your Honor, on this point it comes
13 straight out of *McDonough*. This language does come straight
14 out of *McDonough*. The concept of the *quid pro quo* is fleshed
15 out in the elements.

16 THE COURT: That is what I -- yeah.

17 MR. KRY: I meant to say about that --

18 THE COURT: Why don't we talk about it there because
19 it seems to me the whole idea of this is, this is sort of the
20 ding-ding-ding and then they're defined in substantially more
21 detail when we get back into what does that mean.

22 MR. KRY: We would want the official position replaced
23 with the exercise of official acts or exchange for official
24 acts throughout. Wherever your Honor thinks it is most
25 appropriate to talk about that is fine but we would want the

FBJ5sil2

charge conference

1 change made throughout. And on the *McDonough* point, I do have
2 a lot to say about that whenever you want to hear it.

3 THE COURT: Okay. Why don't we -- it seems to me that
4 probably the most appropriate time to talk about it, although I
5 recognize we trigger a change here, if you persuade me that you
6 are going to get to Element 3.

7 MR. KRY: Okay.

8 MR. MASTER: We have a comment on 2.

9 THE COURT: On page 22.

10 MR. KRY: Our first one is at 14 to 15; are you before
11 then?

12 MS. COHEN: We are line 16.

13 THE COURT: Okay.

14 MR. KRY: So, on 14 and 15 the instruction says: The
15 term property includes money and tangible and intangible things
16 of value that are capable of being transferred or given from
17 one person to another. The reason why we object to this
18 instruction is that I don't think it is the law that any
19 intangible thing of value is necessarily property. In *Sekhar*
20 the Court explicitly left that issue open. There are some
21 cases that have held that certain types of intangible things of
22 value may be property but that's a far cry from saying that any
23 intangible thing of value is property. And it is a significant
24 issue in this case because the entire concept of a mesothelioma
25 lead as being a specie of intangible property is something the

FBJ5sil2

charge conference

1 government invented for the purposes of this one case. There
2 is no other case out there that's endorsed that as a species of
3 property.

4 Here, our preference would be just to delete the
5 sentence and leave it as a question of fact for the jury to
6 decide whether these are property or not. So, that would be
7 our preference. If the Court is not willing to do that what we
8 would suggest, in the alternative, is that the Supreme Court
9 has held that confidential business information is a species of
10 property, that's the *Carpenter* case, for purposes of mail and
11 wire fraud. So, an instruction to the effect that the term
12 property includes money, tangible things and certain intangible
13 things such as confidential business information I think would
14 also be an accurate statement of the law. But, just an
15 instruction that says any intangible thing of value is
16 property, I don't think, is supported by existing law.

17 MR. MASTER: So, first of all, just to respond to the
18 idea that this was an invented --

19 THE COURT: Don't respond to that.

20 MR. MASTER: No. Okay.

21 So, there was testimony that mesothelioma leads are
22 actually, have a great deal of value and that firms like
23 Simmons pay quite a bit of money to obtain them. So, with
24 respect to the particular comment on property including money,
25 tangible and certain intangible things of value, if you want to

FBJ5sil2

charge conference

1 add: Such as confidential business information --

2 MS. COHEN: That would just confuse the jury. There
3 is nothing here having to do with confidential business
4 information.

5 MR. McDONALD: Just on the point, *Sekhar*, you said
6 *Sekhar* reserved the question but *Sekhar* specifically said that
7 it wasn't disturbing the decisions and it cites the Ninth
8 Circuit's decision in the *Zimmick* case but in the *Zimmick* case
9 the Second Circuit law is exactly the same. It says that
10 intangible property, like goodwill and customer revenues, are
11 property for purposes of the Hobbs Act. I mean, it is not
12 limited just to confidential business information. I think we
13 would resist any specific limitation because it really is
14 quite -- it really is quite broad.

15 THE COURT: I am struggling for what would be an
16 intangible thing of value that is capable of being transferred
17 or given from one person to another that would not be property
18 for Hobbs Act purposes.

19 MR. KRY: I mean, I don't think you get to the
20 question of whether you can transfer it or not if it is not
21 property to begin with.

22 THE COURT: There are many intangible things but this
23 is intangible things that have value and that are capable of
24 being moved from one person to another.

25 MR. KRY: Right.

FBJ5sil2

charge conference

1 THE COURT: So, what example is in that -- fits that
2 definition and isn't property for purposes of Hobbs Act?

3 MR. KRY: Right. Part of the problem here is I don't
4 even think we agree that leads can be transferred because there
5 is no deprivation of property, there is only obtaining property
6 and, again, this goes back to the motion to dismiss issue so I
7 think that we don't agree with the premise of that. It bears
8 keeping in mind that the concurrence in *Sekhar* said for example
9 that the recommendation of a general counsel wasn't even
10 property so you don't get to the issue of whether it's
11 transferable or not. And so, I do think there are plenty of
12 intangible things that aren't property, there are plenty that
13 aren't transferable property. This pre-judges the issue of
14 whether this is property and both of those things, I think, are
15 questions that shouldn't -- if they're going to be resolved in
16 a matter of law they should be resolved in our favor which is
17 what we argued on Rule 29 but we certainly shouldn't get a
18 directed verdict that the jury has to conclude that
19 mesothelioma leads are both property and transferable property
20 for purposes of the Hobbs Act.

21 THE COURT: How would it get charged?

22 MR. KRY: So our suggestion would be either, one, just
23 leave it to the jury to decide whether property was deprived
24 from one person and transferred to another person --

25 THE COURT: You keep saying deprived but you have lost

FBJ5sil2

charge conference

1 that argument.

2 MR. KRY: I have, so I -- but it is still our
3 position.

4 THE COURT: That would be your first choice. You are
5 not going to get that.

6 MR. KRY: The second one would be when we looked into
7 this issue about what types of intangible property have been
8 held to be property for the Hobbs Act, the one that seemed to
9 come closest to the government's theory here was the
10 confidential business information. And so, you know, we would
11 be okay with an instruction that said that confidential
12 business information is intangible property and then that we
13 can let the jury decide whether that's what we are talking
14 about here or not. But I just don't think there is any law
15 that supports the idea that any intangible thing of value is
16 property.

17 THE COURT: But you haven't given me an example of an
18 intangible thing of value that is capable of being transferred
19 that is not property.

20 MR. KRY: I just don't think you get to the question
21 of whether it can be transferred or not until you have decided
22 if it is property or not and so I -- it may be that most of the
23 time, if something is capable of being transferred and it has
24 value it might be property but that doesn't make it a true
25 statement of law that any intangible thing of value is property

FBJ5sil2

charge conference

1 which is what that --

2 THE COURT: That's not what it says. It says it
3 includes intangible things of value that are capable of being
4 transferred or given from one person to another which is what
5 the *Sekhar* decision says it has to be, capable of being
6 transferred, and that's why the recommendation didn't work
7 because it is not transferred. Nothing moves.

8 MR. KRY: Right. So there is two separate questions,
9 one, is it property and two is it transferable property. And
10 so the majority -- you shake your head but that's what *Sekhar*
11 says. The majority in *Sekhar* reserved in a footnote whether
12 this was property or not and said it is not transferable
13 property so we don't get that. A concurrence in *Sekhar* said I
14 don't think it is property at all.

15 And so, those are two distinct issues and so we just
16 legally object to the suggestion here that any intangible thing
17 of value is property.

18 THE COURT: What's the government's position? You
19 want to keep it as is? Amend it in some way? I am perfectly
20 happy with it the way it is.

21 MS. COHEN: I think it is fine as it is.

22 THE COURT: I will reconsider if you can give me an
23 example of an intangible thing of value that is capable of
24 being transferred that you think would not be property for
25 Hobbs Act purposes.

FBJ5sil2

charge conference

1 MR. KRY: Thank you.

2 THE COURT: I just can't think of one and that's why.
3 Okay?

4 MR. KRY: Thank you.

5 THE COURT: All right.

6 MR. KRY: I think the government had the next change.

7 MS. COHEN: Your Honor, we start on page 22, line 16
8 through 24 and it goes down, our proposed change is down on
9 line 20.

10 THE COURT: Okay.

11 MS. COHEN: Where it says: On the other hand, if you
12 conclude that Dr. Taub --

13 THE COURT: Yes, I thought that change was okay.

14 MS. COHEN: Okay. That change would be did nothing
15 more than recommend to his patients that they contact
16 Mr. Silver, then the government...

17 MR. KRY: Right, and I --

18 MS. COHEN: Etc.

19 MR. KRY: I misspoke. I guess we did have an earlier
20 objection on line 17 but it is kind of one that runs through
21 the entire paragraph.

22 THE COURT: Okay.

23 MR. KRY: This is the issue you alluded to before.

24 Evidently the instructions are going to treat whether
25 mesothelioma leads are property or not as a question of law.

FBJ5sil2

charge conference

1 THE COURT: Tell me why it is not a question of law.

2 MR. KRY: Well, because we think it is a question of
3 fact. It is an element of a criminal offense whether property
4 was transferred from one person to another and so that --

5 THE COURT: The question is -- that's clearly the
6 question of fact is was there a transfer of property. The
7 question is the definition of property. Normally terms get
8 defined.

9 MR. KRY: Certainly in cases before where, in many
10 cases there can't be any genuine issue about whether or not
11 something is property or not like with money or something like
12 that. But, in a situation like this where you have a somewhat
13 novel concept of property like mesothelioma leads, our position
14 is that that should be left to the jury as to whether the
15 evidence shows there was a transfer of property or not
16 including whether it is property.

17 MR. MASTER: I don't want to interrupt, sorry.

18 To address this issue we did just think of one
19 additional amendment we could have: If you find that Dr. Taub
20 gave such information to Mr. Silver, and that such information
21 had value. So, that then addresses this concern that Mr. Kry
22 was raising and it leaves it open to the jury to determine
23 whether that information had value.

24 MR. MOLO: It doesn't have value without it being
25 property.

FBJ5sil2

charge conference

1 MR. KRY: That's the point that we were making earlier
2 is that not everything with value that are not property --

3 THE COURT: There are many things that have value that
4 are not property: Love, hate.

5 MR. KRY: And both can be transferred.

6 THE COURT: They can't be transferred, though.

7 MR. KRY: They can be obtained.

8 THE COURT: Can't be transferred, though.

9 So, if you find that Dr. Taub gave such information to
10 Mr. Silver and that information had value and can be
11 transferred then you should proceed to consider this element.

12 MR. KRY: So, I think that addresses some of the
13 problems in this paragraph but not all of them. Again, at the
14 end of day, even though it might have value and be capable of
15 being transferred, I don't think it necessarily makes it
16 property and so --

17 THE COURT: How do you want to define property? Tell
18 me what the proposed definition from the defense is.

19 MR. KRY: Right. So, we had two proposals, one was
20 leave it to the jury and number two was in light of the fact
21 that the Supreme Court had said that confidential business
22 information is property, we would be fine with an instruction
23 that told the jury that.

24 THE COURT: But that's not appropriate because that
25 doesn't define for the jury what they need to consider to make

FBJ5sil2

charge conference

1 the determination of whether this is or is not property. Just
2 to say leave it to the jury is like, well, I can envision this
3 now. The jury comes back and says we have to find that
4 property was transferred. What's property? I mean, we spend a
5 whole year with first year law students talking about what is
6 property and we are going to leave it to a lay juror?

7 MR. KRY: That's why we have our second suggestion
8 which is the one thing we know that the Supreme Court has held
9 is property for the mail and wire fraud statutes is
10 confidential business information. And so, if you want to
11 instruct the jury that they have to find that the mesothelioma
12 leads were confidential business information that has value and
13 is capable of being transferred, that would --

14 THE COURT: Just because the Supreme Court has found
15 that is property does not mean that's the only intangible that
16 is property. The Supreme Court has never said that.

17 MR. KRY: That's true.

18 THE COURT: And there are lots of other cases that
19 point to other intangible types of property that are property
20 for purposes of Hobbs Act. So, I don't find the defense's
21 suggestion to be helpful. I am willing to consider -- willing
22 to consider something -- if you give me something that defines
23 it in a way that is true to the law and that would be helpful
24 to a jury, but just saying they have to decide if it is
25 property and then we don't define property isn't helpful.

FBJ5sil2

charge conference

1 That's why, I mean -- I have is got a definition of property in
2 there. You don't like my definition so I am happy to consider
3 changes to that definition or I am happy to consider other
4 suggestions but right now I think, with the suggestion the
5 government has provided, it gets an awful long way to the
6 defense position if not entirely.

7 MR. KRY: Okay. Well speaking from, as the proponent
8 of the defense position, we just maintain our objection that
9 that's not the instruction.

10 THE COURT: That's fine. Okay.

11 MR. KRY: On line 19.

12 THE COURT: So let me -- so, this will say, in Count
13 Five, the government alleges that the property that was given
14 was leads from mesothelioma cases. Leads or information about
15 mesothelioma patients that can be used by attorneys to make
16 contact with and possibly obtain the patients as clients of the
17 firm. If you find that Dr. Taub gave such information to
18 Mr. Silver and that information had value and can be
19 transferred, you should proceed to consider this element. On
20 the other hand, if you conclude that Dr. Taub did nothing more
21 than recommend to his patients that they contact Mr. Silver,
22 then the government has not proven that property, as required
23 by this element, was transferred. In that instance you must
24 find that Mr. Silver is not guilty.

25 MR. KRY: Right. So two other objections, one of

FBJ5sil2

charge conference

1 which is just for preservation on line 19 --

2 THE COURT: The deprivation request.

3 MR. KRY: That is, as a result, Mr. Silver deprived
4 someone of their property and obtain it for himself.

5 The second point, my objection to the government's
6 phrasing of this, they say Dr. Taub did nothing more than
7 recommend to his patients that they contact Mr. Silver. I
8 mean, that's not a fair statement of the concept here because
9 Dr. Taub could have done a lot of other things in addition to
10 that. The question is did he transfer some property above and
11 beyond his recommendations. I don't like the nothing more
12 phrasing. I think the Court's phrasing was "simply referred as
13 patients to Mr. Silver at Weitz & Luxenberg." I think that
14 that phrasing would be better which is what the Court had. The
15 problem with "it did nothing more than" suggests if there is
16 anything that Dr. Taub did apart from recommending his patients
17 then all of a sudden this element is met and I don't think that
18 was the intent of the instruction.

19 (Continued on next page)

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FBJYSIL3

1 MR. MASTER: The main issue we're concerned with is
2 the use of the word "referral request" Because it's used in
3 different contexts.

4 MS. COHEN: "If you conclude that Dr. Taub simply
5 recommended or only recommended. "Simply" seems not a great
6 word.

7 MR. KRY: We would prefer "simply."

8 THE COURT: How about "just."

9 MS. COHEN: "Just" is fine.

10 THE COURT: "On the other hand, if you conclude that
11 Dr. Taub recommended to his patients, Mr. Silver at Weitz &
12 Luxenberg --"

13 MS. COHEN: "Dr. Taub just recommended to his patients
14 that they contact Mr. Silver."

15 THE COURT: "Recommended" that sentence is a little
16 bit ambiguous. "On the other hand, if you conclude that
17 Dr. Taub just recommended his patients to Mr. Silver," it's
18 really it's "recommended" Mr. Silver to his patients.

19 So maybe that's it. It's that we turn the sentence
20 around -- right? -- "If, on the other hand, you conclude that
21 Dr. Taub just recommended Mr. Silver at Weitz & Luxenberg to
22 his patients and did not provide --"

23 MS. COHEN: Can you just read that again.

24 THE COURT: "If you conclude that Dr. Taub just
25 recommended Mr. Silver at Weitz & Luxenberg to his patients and

FBJYSIL3

1 did not provide leads regarding the patients to Mr. Silver."

2 MR. MOLO: Can we have a two-minute break.

3 THE COURT: Yes.

4 (Recess)

5 THE COURT: Okay. Are we done with page 22?

6 MR. KRY: Yes. Just one further suggestion here,
7 which is that going with what the Court expressed in terms of
8 the definition of property, we would want to add on line 21 and
9 22 after "and did not provide leads regarding patients to
10 Mr. Silver, or that the leads had no value, then the government
11 has not proven that property is required" just because under
12 the earlier definition the instruction recognizes that the
13 intangible thing has to have value to be property.

14 MS. COHEN: No. The information had value.

15 THE COURT: It will read as follows: "If you find
16 that Dr. Taub gave such information to Mr. Silver and that
17 information had value and can be transferred, then you should
18 proceed to consider this element."

19 MR. KRY: Right. So this is just a conformance change
20 to that. We have to repeat that in the next sentence. We have
21 to say, "On the other hand, if you conclude that Dr. Taub just
22 recommended Mr. Silver to his patients at Weitz & Luxenberg and
23 did not provide leads regarding the patients to Mr. Silver or
24 that the leads did not have value or were not --" otherwise, it
25 doesn't track the other sentence.

FBJYSIL3

1 MR. MASTER: I don't know why we have to keep on
2 saying what it is not.

3 MS. COHEN: I think that's really confusing.

4 THE COURT: I'll consider that.

5 MR. KRY: Thank you.

6 THE COURT: Or, alternatively, the other way to do it,
7 which might be more understandable is to make the first "If"
8 sentence clearer that they have to find all three things: "If
9 you find, that, one, he gave information; two, the information
10 had value; and three, the information can be transferred, then
11 you can proceed. If you find only, then you cannot."

12 Okay?

13 MS. COHEN: That's fine, your Honor.

14 THE COURT: Page 23.

15 MR. KRY: In lines 1 to 3, we have the same issue on
16 the excerpt part of the case. Again, we think whether it's
17 property or not shouldn't be determined as a matter of law.

18 MR. MASTER: We're okay with that change.

19 That's your proposed change?

20 MR. KRY: Yes.

21 MR. MASTER: We're okay with that.

22 THE COURT: Okay.

23 MR. KRY: And then lines 6 to 7 would just need to be
24 modified to track wherever we ended up on the earlier
25 instructions. Right now the parenthetical presumes that both

FBJYSIL3

1 mesothelioma leads and tax certiorari business are obtainable
2 property.

3 THE COURT: So that would mean that there should be a
4 sentence in the first paragraph that says, "If you find that
5 the tax certiorari business is not property, then you should
6 acquit."

7 Right? It has to be property.

8 MR. MASTER: That's true of --

9 MS. COHEN: That's true of everything.

10 THE COURT: Correct. So for mesothelioma, we
11 specifically say, you've got to find that it was a lead and
12 transferable property.

13 So the government has just agreed that we're okay on
14 the change that says you have to determine that it's property
15 that is capable of being transferred.

16 So the idea would be to track -- as with mesothelioma,
17 that they have to find that it has value, that it's capable of
18 being transferred.

19 MR. KRY: Our thought was just on line 7 regardless of
20 how it's implemented, we just think the parenthetical --

21 THE COURT: If they're not property, then they've been
22 told that you have to acquit. So I'm not sure what you would
23 suggest for that parenthetical.

24 MR. KRY: It could be deleted, for example. I'm just
25 concerned that it's confusing to the jury to have a

FBJYSIL3

1 parenthetical that presumes they've resolved the disputed issue
2 a particular way.

3 THE COURT: I'm okay on deleting it.

4 Do you care?

5 MR. GOLDSTEIN: It clarifies for the jury this part of
6 the element. Our concern is to make this even more confusing
7 than it is. We now have the jury having to sort of decide
8 whether tax certiorari business has value and is transferable,
9 which I think they can do.

10 Here you've now said that they can't proceed unless
11 they make that finding. And now you're talking about the
12 obtaining of the property, whether the property was not
13 legitimately owed.

14 To point out for the jury what the property is that's
15 the issue here is helpful to the jury.

16 MS. COHEN: Unless they've already determined that
17 it's property. You've told them. If you don't determine it's
18 property, you don't go further.

19 MR. MASTER: In general, you must prove each element.

20 MS. COHEN: I think without this, it's much more
21 confusing.

22 MR. MOLO: Maybe if you have found leads for
23 mesothelioma cases and tax certiorari business as property. I
24 think Mr. Kry's point is it just creates a level of assumption
25 here that for the jury it would be easy to conclude that that

FBJYSIL3

1 is property.

2 THE COURT: Let us take a look at it after we make the
3 changes that we just talked about. I hear you. I'm not sure
4 that, with the modifications further up, that that's not going
5 to be more confusing than elucidating.

6 MS. COHEN: I don't think each time you go through the
7 elements you don't go back to the first. Like when you're
8 talking about a wire, you don't say if you don't prove intent,
9 you don't get to the wire.

10 THE COURT: So I'll consider that.

11 What's next, Mr. Kry?

12 MR. KRY: On line 7 we had another deprivation
13 instruction. We just note our objection on that.

14 THE COURT: That's the same one.

15 MR. KRY: The next one we had was online 16. This is
16 the McDonough issue again. There's a reference to Mr. Silver's
17 official position, and our position is that that should refer
18 instead to in exchange for the promise of an official act or
19 just in exchange for an official act.

20 THE COURT: This is the McDonough case; right?

21 MS. COHEN: Didn't we already rule on that?

22 MR. KRY: No. I thought that we had decided we were
23 going to talk about it later.

24 MS. COHEN: Later is now.

25 MR. KRY: McDonough -- the language in that case does

FBJYSIL3

1 refer to -- what it says is in order for a jury to find the
2 defendant guilty of extortion under color of official right,
3 the government must prove beyond a reasonable doubt that the
4 victims were motivated to make payments as a result of the
5 defendant's control or influence over public officials and that
6 the defendant was aware of this motivation.

7 And then there's a cite to Margiotta, and that's where
8 this public officials language is coming from.

9 If you look at the cite for Margiotta, it actually
10 says official acts. It uses the correct language.

11 MR. MASTER: This is a later case.

12 MR. KRY: The disputed issue here is nothing to do
13 with official position or official acts. This entire section
14 of the opinion is about a completely unrelated issue, about
15 whether it was problematic that they hadn't specified the
16 particular individuals that allegedly had the motivation at
17 issue here.

18 So the case was not addressing the distinction between
19 public officials and -- sorry. A public official's status as
20 an official and his official acts.

21 So I think it's unreasonable to read this case as
22 modifying Margiotta which actually talked about official acts.
23 Beyond that, Evans, which is the Supreme Court, which was
24 indisputably addressing this issue, says at page 268, that "The
25 government has to show that a public official has obtained a

FBJYSIL3

1 payment to which he was not entitled knowing that the payment
2 was made in return for official acts."

3 So Evans also uses the same language as Margiotta.
4 Evans is another case that specifically focused on the quid quo
5 pro requirement. It's not a reference in a case that has
6 nothing to do with it. This is a fundamental issue because a
7 quid pro quo is an exchange of an act for something of value.

8 It's not I'm a politician. I hold public office, and
9 you're giving me something where there's no quid pro quo.
10 There's a basic difference between exchanging something of
11 value for an official act and exchanging something of value
12 just because somebody is an official. The second of those
13 things is not a quid pro quo. It's a quid with a status. It's
14 not an act for an act.

15 So notwithstanding this reference to public officials
16 in McDonough, I don't think that one sentence can fairly be
17 viewed as changing what's a pretty fundamental requirement for
18 a quid quo pro.

19 I think the law that's stated in Margiotta and stated
20 in Evans is that there has to be an official act in return for
21 the thing of value and not public official status.

22 MR. McDONALD: Your Honor, we may be able to clarify
23 this. There really are two separate concepts there, and I
24 think they're both captured here.

25 It's true that extortion under the color of official

FBJYSIL3

1 right requires a quid pro quo or the defendant's intent with
2 respect to the quid pro quo which we've been discussing fraud
3 and services fraud.

4 The thing that extortion under the color of official
5 right adds or the thing that's slightly different in that
6 context from honest services fraud is there the victim's
7 motivation does matter.

8 The victim's motivation in extortion under the color
9 of official right doesn't have to be motivated by a quid pro
10 quo. The jury has already been charged on the quid pro quo.

11 The victim has to be motivated to part with his
12 property based on the defendant's position or official
13 authority.

14 They are two slightly different concepts. I
15 understand they're pretty close, but they're slightly
16 different. To use the same language to define both of them
17 would be even more confusing.

18 MR. KRY: McDonough, as I mentioned, whatever elements
19 it's talking about it cited Margiotta from that point, the
20 actual quote from Margiotta is "A public official may be guilty
21 of obtaining money under color of official right if the
22 payments are motivated as a result of his exercise of the
23 powers of his public office and he is aware of this fact."

24 That's the language in Margiotta that McDonough then
25 quotes. Somehow that language then morphs from exercise of the

FBJYSIL3

1 powers of his public office, which is the right focus, into his
2 status as a public official, which is incomplete.

3 MR. McDONALD: It's not incomplete because they're
4 both captured. So long as the charge makes clear that there's
5 a quid pro quo or the defendant's intent with respect to the
6 quid pro quo.

7 MR. KRY: You know what's going to happen is that the
8 jury is going to see -- this same concept -- it came up twice
9 before. It comes up here. I think it comes up at least two
10 more times.

11 If there are constant references in these instructions
12 that in order to prove extortion you have to prove that the
13 defendant was just motivated by -- the party providing the
14 property was motivated by the victim's official status, that
15 completely changes the focus of the case.

16 I think there's a serious risk that a jury will think
17 that's sufficient to establish a quid pro quo, and it's not.

18 THE COURT: Suppose with the changes on line 16 I
19 insert "In addition" before -- the third element is that he
20 used the authority of his public office to obtain property for
21 himself or for a third party and that the property was given
22 because of Mr. Silver's official position. In addition, as was
23 the case when I charged you on honest services fraud, the
24 extortion counts require the government to prove beyond a
25 reasonable doubt the existence of a quid pro quo.

FBJYSIL3

1 MR. KRY: It seems unnecessarily confusing. I don't
2 know how you can have -- if it was given in exchange for an
3 official act, I don't see why it matters that you instruct that
4 it was given for his official position, because it seems like
5 the official position necessarily includes things that are
6 given in exchange for an official act.

7 It seems to needlessly confuse the jury to inject that
8 concept. Again, this was a change that was made in the
9 preliminary instructions.

10 So the jury has already been told that what matters
11 for extortion is was property given in exchange for an official
12 act. So making this change is nothing new, and injecting this
13 concept of official position is just going to confuse the jury
14 if they've already been given the instruction that we want.

15 THE COURT: I am confident that the jury does not
16 remember a thing that I told them in day one of this trial.

17 MR. KRY: In that case I will just appeal to our
18 position being a correct state of the law. Introducing the
19 concept that it's sufficient that a person have done something
20 just because of Mr. Silver's official position runs a serious
21 risk whether or not you delete the words as was the case which
22 I don't think is going to sufficiently clarify this that the
23 jury can convict just because they think that the real estate
24 developers or Dr. Taub provided things of value to Mr. Silver
25 because of his position, which that could be to generate

FBJYSIL3

1 goodwill.

2 It could be to foster a relationship. A whole bunch
3 of things that aren't quid pro quos. It's only when it's given
4 in exchange for an official act.

5 MR. McDONALD: A key point with respect to the
6 victim's motivation in the extortion and the color of official
7 right context is that the victim doesn't have to be motivated
8 by a quid pro quo. The because of language is somewhat
9 different.

10 So they really are two discrete concepts. We would
11 like them -- we think they both need to be in there. We think
12 the "in addition" language would solve it.

13 MR. KRY: Margiotta says otherwise. The language I
14 quoted from there and which McDonough purported to be quoting
15 from clearly talks about a result of his exercise of the powers
16 of his public office.

17 I don't think it's fair to read McDonough as somehow
18 radically changing the scope of that requirement. I just
19 dispute that there's one public official status element that
20 applies to this one part of the extortion charge and exchanged
21 for an official acts element that applies to something
22 different.

23 I think it's one standard, was the payment made in
24 exchange for official acts. I agree with you that for
25 extortion the alleged victim's mental state also matters.

FBJYSIL3

1 I don't think that's a mental state different from the
2 mental state of a quid pro quo. It's one and the same thing.

3 THE COURT: The concept in the next paragraph really
4 captures this. So, when reading this, it seems to me I may
5 have made it more complicated than I like.

6 So suppose we change the first paragraph to say the
7 third element that "The government must prove beyond a
8 reasonable doubt is that Mr. Silver used the authority of his
9 public office to obtain the property for himself or for a third
10 party and that the property was given and exchanged for
11 official acts as the opportunity arose."

12 And then go to the next paragraph, "To satisfy this
13 element, the government must prove that he obtained property to
14 which he was not entitled knowing that it was given in exchange
15 for official acts, as the opportunity arose, rather than being
16 given voluntarily and unrelated to his public office.

17 "In other words, the government must prove that the
18 extorted party was motivated at least in part by his role as a
19 public official whose control or influence over public
20 officials."

21 MR. KRY: That does address our concern in the first
22 paragraph. There are a couple points later on that I'm happy
23 to address now.

24 MR. McDONALD: Your Honor, we would object to
25 incorporating the "in exchange for." That effectively requires

FBJYSIL3

1 that the victim -- that effectively requires us to prove that
2 the victim has engaged in a quid pro quo, which is just not the
3 law. There has to be some victim motivation. The victim is
4 coerced by the official position.

5 There are all sorts of extortion cases that say in the
6 typical extortion case you have to show a threat or some sort
7 of coercion. But understand the color of official right
8 context, it's the office itself.

9 It's the public position that creates that coercing
10 effect, vis-a-vis, the victim. So those cases don't say that
11 the victim has to think that the victim was engaging in a quid
12 pro quo.

13 The reason that the official position was necessary is
14 because that's the source of the coercion under extortion.

15 MR. KRY: Not in the abstract. It's the threat of an
16 official act. These efforts to separate the official act
17 that's the basis for the quid pro quo and the threat of the
18 official act that's the basis for the alleged victim's mental
19 state -- I don't view those as two separate things. Margiotta
20 clearly didn't because it expressly phrases this in terms of --

21 THE COURT: Although the facts there were different as
22 I recall, just in terms of what Margiotta was doing.

23 MR. KRY: I'm not sure that they're different in any
24 relevant respect. At the end of the day, the question is is it
25 enough that the third parties here were motivated by

FBJYSIL3

1 Mr. Silver's position, or was it because they were motivated
2 that Mr. Silver was going to use that official position to do
3 official acts?

4 That's the same issue that Margiotta was confronting.
5 It's not the issue that McDonough was confronting. It's also
6 the same issue that Evans was confronting. All those cases
7 focus on the official act.

8 To then to go back to somebody's mere status as a
9 public official is confusing and not the right state of the
10 law.

11 Also beyond that, the instructions that your Honor
12 read out I don't even think raises that issue. At least, if I
13 heard it correctly, I don't think it even implicates this
14 issue.

15 MS. COHEN: It does.

16 THE COURT: It does. Because it essentially flips
17 back to what were the victims thinking.

18 MS. COHEN: I think your Honor should go back to the
19 "in addition."

20 THE COURT: Whether that's in there or not, I'm
21 hearing the government is objecting to the paragraph that
22 starts on line 19.

23 MR. KRY: If you go to the "in addition," what we
24 would request is that clarifying language be added at the end
25 of 18 making clear that a quid pro quo relationship requires

FBJYSIL3

1 that and then incorporate some kind of language about things of
2 value being given in exchange for official acts.

3 What I'm concerned about is without that, the jury
4 might infer that the quid pro quo relationship is just an
5 official position.

6 THE COURT: That's not a quid pro quo. What's the
7 quo?

8 MR. KRY: That's the point.

9 THE COURT: Right. So they've been charged that a
10 quid pro quo is this or that.

11 MR. KRY: It's not obvious that quid pro quo means the
12 same thing in an honest services fraud context as an extortion
13 context unless you make that clear to the jury.

14 I think the only way to do that is when you refer to
15 the quid pro quo relationship here just define it the same way
16 you did before about exchanging things of value for official
17 acts.

18 THE COURT: Remember that the jury is going to have
19 the charge with them in the jury room. So repeating may not be
20 necessary as opposed to just saying, if you don't remember what
21 quid pro quo is, go back.

22 MR. KRY: Nonetheless, these instructions have many
23 different concepts in them. On something as central as to
24 whether the government has to show that there was an exchange
25 of things of value for official acts, I don't think it hurts to

FBJYSIL3

1 remind the jury of that essential feature of a quid pro quo.

2 THE COURT: It doesn't actually have to be in exchange
3 for official acts though; right? So if the public official is
4 threatening or promising, that's sufficient because it's the
5 public position that provides the threat. They don't actually
6 have to act on it.

7 MR. KRY: No, but it has to be the threat of the act.

8 THE COURT: That can be implicit from the fact that
9 they're a public official.

10 MR. KRY: I don't dispute that. It still has to be a
11 threat of an act. It has to be threat of an official act.

12 THE COURT: But it doesn't have to be in exchange for
13 accounts.

14 MR. KRY: No, but that's contrary to Evans. Evans
15 says there has to be a quid pro quo.

16 THE COURT: I think I'm going back to the original
17 language in the first paragraph with the addition of, "In
18 addition" before the last sentence.

19 MR. KRY: Just to sharpen what we were asking for
20 before, on page 18, there's a sentence that defines what a quid
21 pro quo is. We would just ask that that language along those
22 lines be given again here.

23 MR. MASTER: Actually, your Honor, now that I'm seeing
24 the language that Mr. Kry was citing from Margiotta, as far as
25 I read it, it doesn't support what he's saying.

FBJYSIL3

1 It says, "Furthermore, it is not necessary to support
2 a Hobbs Act charge by showing that a public official offered a
3 quid pro quo in the form of some specific exercise of the
4 powers of his office or forbearance to carry out a duty a
5 public official may be guilty of obtaining money under color of
6 official right if the payments are motivated as a result of his
7 exercise of the powers of his public office and he is aware of
8 this fact."

9 In other words, specifically distinguishing it from
10 the specific exercise of the powers of his office.

11 MR. KRY: We're not talking about specific exercises.
12 There is already an as opportunity arise instruction here
13 somewhere which is supported by cases that the government
14 cited. That's the distinction that this is drawing here. I do
15 think that Margiotta clearly refers to being motivated by his
16 exercise of the powers of his public office, not just the
17 existence of his public office.

18 MR. MASTER: We were prepared to live with the
19 language that Mr. Kry cites in Margiotta.

20 THE COURT: This really guess into the whole Section 2
21 problem.

22 MR. MASTER: As far as the articulation of the legal
23 standard, I think the standard that is articulated in Margiotta
24 is fine. It's an accurate statement.

25 THE COURT: I hate defining things in terms of what

FBJYSIL3

1 they don't have to find.

2 MR. MASTER: Just even what is required in exchange
3 for exercise. The portion that Mr. Kry is stating is --

4 THE COURT: "A public official may be guilty of
5 obtaining under color of official right if the payments are
6 motivated as a result of his exercise of the powers of his
7 official office, and he is aware of this fact."

8 MR. MASTER: Yes.

9 THE COURT: I think that's what the second paragraph
10 says but says it in plainer English.

11 MR. KRY: It's plainer because it deletes the word
12 "exercise," which is the key point.

13 THE COURT: So you want exercise given in exchange for
14 the exercise of official act? Will that make you happy,
15 Mr. Kry? I am living to make you happy.

16 MR. KRY: So the second paragraph I don't think is
17 where we have our concern. Before we got off the first
18 paragraph though, at the end where we say the existence of a
19 quid pro quo relationship, I just wanted to point out that in
20 Evans the Court said that the government need only show that a
21 public official has obtained the payment to which he was not
22 entitled knowing that the payment was obtained in return for
23 official accounts.

24 So in exchange for official acts or in return for
25 official acts as a description of what quid pro quo requires in

FBJYSIL3

1 the context of extortion also comes right under Evans.

2 So I do think it would be very helpful and necessary
3 to clarify for the jury that when we say quid pro quo
4 relationship, just say, in other words, and then we can use
5 this language from Evans. In other words, that a payment was
6 made in return for official acts.

7 THE COURT: I thought we had come up with language
8 earlier.

9 If I picked up the definition to keep it consistent --
10 I don't want to play with different language which is defined
11 differently in different places -- it would be going back to
12 what you discussed on page 18 which says, "The government --
13 requires the government to prove beyond a reasonable doubt the
14 existence of a quid pro quo relationship. The government must
15 prove --"

16 MS. COHEN: I thought we deleted "relationship."

17 THE COURT: I did.

18 MS. COHEN: Okay.

19 THE COURT: "The government must prove that the
20 property was sought or received by Mr. Silver, directly or
21 indirectly, in exchange for the promise of or performance of
22 official actions."

23 MS. COHEN: Yes. I think that would take care of it.

24 THE COURT: So that will go in at the end of that
25 first paragraph, and it will just -- it's not quite -- it's not

FBJYSIL3

1 a complete, direct quote from before because that was using
2 briber kickback, and this is using property. But it will be
3 the same words.

4 MS. COHEN: And the rest stays the same other than in
5 "addition"?

6 THE COURT: And then on line 21, you want exercise of
7 official acts?

8 MR. KRY: Which line? Sorry?

9 THE COURT: Line 21.

10 MR. KRY: No. That one I'm fine how it is, "knowing
11 that it was given in exchange for official acts."

12 The only thing I would change there is the last
13 sentence where we say rather than being given voluntarily and
14 unrelated to Mr. Silver's public office, this is now
15 introducing the public office concept into the quid pro quo
16 requirement, which is that's the exact risk I'm worried about.
17 I think the easiest solution is we would be fine with striking
18 the "rather than" clause.

19 THE COURT: If you don't want that clause, I'm sure
20 the government is happy to dispense with it. That's in there
21 as a pro defense charge.

22 MS. COHEN: We're fine to cross that.

23 MR. KRY: What we do want in there, in its place, is
24 the language from Ganim that we quoted earlier. So this would
25 say, "This element does not prove in the benefit is intended to

FBJYSIL3

1 be or accepted as an effort to buy favor or generalized
2 goodwill from a public official who either is, has been, or
3 will be at some later time in a position to act favorably to
4 the giver's interest, nor is this element proved if a public
5 official accepts a personal benefit if his or her intent in
6 taking those items is solely to cultivate a relationship with
7 the person or persons who provided them."

8 That language, again, is straight out of Ganim. It's
9 been specifically approved by the Second Circuit.

10 MS. COHEN: Your Honor, that's what we've already
11 discussed and you rejected.

12 THE COURT: I don't know that you rejected it. I
13 thought I said I would consider it. I'm not crazy about the
14 language. I'm also not crazy about charging what they don't
15 have to find or kind of what isn't enough because there are
16 lots of things that aren't enough.

17 MR. KRY: Right, but in the context of a case like
18 this, I do think it is really important to make clear that
19 these particular things, which are what a lot of the trial
20 evidence fell into, are not enough.

21 Without that, I think the jury will be left to wonder
22 whether efforts to curry generalized goodwill or foster a
23 relationship are or aren't sufficient to constitute a quid pro
24 quo.

25 THE COURT: I'll consider it.

FBJYSIL3

1 MR. KRY: Thank you.

2 THE COURT: Otherwise, you're not objecting to this
3 paragraph; correct?

4 MS. COHEN: Which paragraph, your Honor?

5 THE COURT: The paragraph that ends in the carryover
6 to page 24.

7 MR. KRY: We also have an objection to the sentence
8 that spans the page where it says where Mr. Silver's role as a
9 public official or his control or influence over public
10 officials.

11 Here again we're picking up the McDonough language.
12 The government's explanation that that is some kind of
13 different element from the quid pro quo -- I don't know what
14 that language is doing in this paragraph. It seems like this
15 should be referring to official acts, not his status as a
16 public officer.

17 So what we had suggested was changing that to the
18 government must prove beyond a reasonable doubt that the
19 extorted parties were motivated at least by Mr. Silver's
20 promise of official acts.

21 THE COURT: That's not right though. That makes it
22 sound like there has to be a conversation where he promises
23 some particular activity.

24 MS. COHEN: I thought we dealt with this already.

25 MR. McDONALD: I thought we had resolved this issue

FBJYSIL3

1 with the first paragraph when we last had the McDonough
2 instruction. It's the same issue.

3 MR. KRY: What did we decide on?

4 MS. COHEN: We're adding in addition before as was the
5 case.

6 MR. McDONALD: I think it's the same objection. Maybe
7 I'm misunderstanding.

8 MR. KRY: Part of the problem is we have the sentence
9 starts out, "in other words," and then it says the McDonough
10 standard.

11 Even on your own theory of the case that's wrong
12 because you're claiming that the McDonough public status
13 requirement is something separate from the quid pro quo
14 official act requirement.

15 You can't connect those in other words because that
16 makes it sound like the quid pro quo is just that they have to
17 show that the alleged victim was motivated by his official
18 status.

19 So at a minimum, that has to change. At a minimum, we
20 should change "In other words" to "In addition" because those
21 are two separate things.

22 THE COURT: Actually, I'm not sure why the whole
23 sentence can't go. Can't we just say, "To satisfy this
24 element, the government must prove beyond a reasonable doubt
25 that Mr. Silver obtained property to which he was not entitled

FBJYSIL3

1 by his public office knowing that it was given in exchange for
2 official acts as the opportunity arose."

3 And then go over to the top paragraph on page 23.

4 MR. MASTER: Since your Honor has already added a
5 sentence talking about quid pro quo in the first paragraph, we
6 actually don't even need the second paragraph.

7 MS. COHEN: The first paragraph is basically the same
8 as the second paragraph as you modified it, your Honor.

9 THE COURT: The only modification that I made was to
10 add the words "In addition."

11 MS. COHEN: Right. I think those are two parallel
12 paragraphs saying the same thing in slightly different language
13 which may be confusing.

14 MR. KRY: The jury needs to be adequately instructed
15 about the concept of a quid pro quo since that's a central
16 issue in the case. So I think any redundancy there is
17 tolerable.

18 THE COURT: There's going to be redundancy because I'm
19 adding to the first paragraph the definition of quid pro quo.

20 MR. KRY: Right. I was responding to the government's
21 suggestion that the entire second paragraph be deleted.

22 MS. COHEN: Except for the addition of going back to
23 the definition of quid pro quo.

24 THE COURT: That's the first paragraph.

25 MS. COHEN: Exactly.

FBJYSIL3

1 MR. KRY: We still want the first sentence of the
2 second paragraph. In addition, we would ask the Court give our
3 Ganim instruction with those two changes.

4 Then the issue is whether the last sentence is
5 necessary as well. That sentence maybe it makes more sense to
6 move up to the first paragraph.

7 THE COURT: I think the last sentence of the second
8 paragraph can just come out. I don't think it adds anything.

9 MR. KRY: As the government pointed out, even on their
10 theory, there are two separate requirements. There has to be a
11 quid pro quo, in other words, an exchange of something of value
12 for official acts under Evans.

13 And then, in addition, there's the element that
14 focuses on the alleged victim's mental state, which requires
15 that the government prove that the victim acted a particular
16 way because of, according to them, the defendant's public
17 office and that the defendant was aware of that motivation.

18 So those are two separate elements. Again, if you
19 believe the government's theory that there is a second element
20 there.

21 So I do think that that needs to be left in.

22 MS. COHEN: Your Honor, that's not an accurate
23 statement of the government's position.

24 MR. KRY: That's what I heard earlier.

25 MS. COHEN: What is your Honor's current thinking?

FBJYSIL3

1 Just so I can understand where we are.

2 THE COURT: I'm sort of trying to read and not listen
3 to you for a while. I think the whole paragraph can come out.
4 I think once the first paragraph is rewritten to include the
5 definition of quid pro quo, it's going to be -- that's going to
6 be adequate to define this element.

7 I'll ponder it. I know you want the Ganim language,
8 which I will consider. I'm not persuaded yet that that is
9 necessary or particularly helpful.

10 MR. MOLO: Your Honor, can I just add one point on the
11 Ganim. That essentially is a theory of the defense
12 instruction. I think without that and the facts here --
13 whatever may or may not have been used in another case, it
14 doesn't matter.

15 Those facts fit this instruction. That's an accurate
16 statement of the law and an actual instruction given by the
17 Second Circuit. To have this go to the jury without that
18 instruction I think would be a real problem.

19 MR. MASTER: One response to that, your Honor, is that
20 I don't know if that is a theory of defense instruction.
21 Certainly the defense is entitled, if they want to say that
22 Mr. Silver contends that if such payments were received, they
23 were received only as an effort to cultivate a relationship or
24 understood as goodwill, whatever that is.

25 So it could be framed in that way. That's

FBJYSIL3

1 traditionally the way that courts deal with the theories of
2 defense.

3 So if Mr. Silver wants to incorporate that concept
4 there, we certainly won't object to a legally accurate theory
5 of defense instruction. I think that's where it should go as
6 opposed to where Mr. Kry has suggested.

7 MR. SHUR: If I understand the Court's concern
8 correctly, it's that you don't want to charge the jury all the
9 things that the government doesn't need to prove, which I
10 understand.

11 The testimony from the government's witnesses actually
12 mirrors some of the language in the Ganim instruction. So I
13 don't think you're out in left field saying you don't have to
14 find this. You don't have to find that. You don't have to
15 find this other thing. This is actually --

16 THE COURT: Why not a theory of defense charge as a
17 way of solving the problem?

18 MR. MOLO: Because it's different to be told that a
19 theory of defense is supported by the law. They have to be
20 told that Ganim is the law.

21 THE COURT: That's right. That would be -- rather
22 than defining elements by what they're not, which I don't like
23 to -- I've done a little bit of it in here, but I try to
24 minimize that -- to have it be a separate charge that says this
25 is the theory of the defense, again, a correct statement of the

FBJYSIL3

1 law.

2 MR. MOLO: It would have to start with that the Ganim
3 statement is the law and that our theory is that we fit within
4 that definition, that legal definition.

5 THE COURT: Submit a proposal.

6 MR. GOLDSTEIN: Our concern --

7 THE COURT: You don't disagree that Ganim is the
8 correct statement of the law?

9 MR. GOLDSTEIN: As a general matter, we don't. As
10 applied here where there were very specific and precise
11 questions asked government witnesses, so you wanted generalized
12 goodwill, and then, yes.

13 That wasn't the only thing that they wanted. I think
14 what the defense is trying to do here is to get an instruction
15 so that they can then point to their very precise or misleading
16 questions on cross to say this is all that we have. This is
17 it.

18 Our concern is that that combined with an instruction
19 that they are asking for that is now looking at the intent of
20 the giver, as opposed to the intent of Mr. Silver, sets up a
21 potentially misleading way for the jury to find a lack of
22 intent by Mr. Silver.

23 MR. KRY: On that point, I think the second sentence
24 or a Ganim instruction they've already conceded correctly
25 focused on Mr. Silver's intent. We proposed an amendment to

FBJYSIL3

1 the first sentence of our Ganim instruction that resolved, in
2 our view, their objections.

3 I don't think it's true that this instruction raises
4 the issue that it's Mr. Silver's intent that matters. If the
5 solution is to instruct the jury that the defense contends that
6 Mr. Silver understood that these payments were made to curry
7 generalized goodwill and to foster a relationship and, you
8 know, if you find that that's correct, then you must acquit.

9 I think that might go a long way towards addressing
10 our concerns with this.

11 MR. MASTER: I don't think that last part is an
12 accurate -- in a theory of a defense instruction, let's say
13 this Ganim concept -- we'll take a look at it.

14 Let's say this Ganim concept is incorporated in the
15 theory of defense. He can say, therefore, that there was no
16 quid pro quo; that Mr. Silver contends there was no quid pro
17 quo because he understood these payments to be fostering
18 goodwill or cultivating a relationship and that, therefore,
19 there was no quid pro quo.

20 He's allowed to -- Mr. Silver is allowed to argue that
21 from that and use that as incorporated in a court's jury
22 instruction which obviously has to include an accurate
23 statement of the law that, therefore, the government hasn't met
24 its burden.

25 So I haven't seen any proposed defense instructions

FBJYSIL3

1 that say if this is proven, you must acquit or if their theory
2 is right, you must acquit.

3 It just simply says this is what the defense contends
4 and that, therefore, the government hasn't met its burden.

5 MR. KRY: I don't know that we would object to that
6 part of it too if the phrasing is that the defense contends
7 that Mr. Silver understood that these payments were made by
8 generalized goodwill from a public official and to cultivate a
9 relationship.

10 And, if you conclude that that's correct, then you
11 must find that the government has failed to proffer that there
12 was a quid pro quo?

13 MR. MASTER: No. That's not what we're saying. We're
14 saying that he contends -- we'll take a look at whatever is
15 proposed.

16 MR. KRY: A theory of defense instruction is no good
17 if there's no consequence if you agree with that theory or not.

18 MR. MASTER: Then he can say, and, that
19 therefore there is no --

20 MR. KRY: It can't just be a characterization that our
21 position --

22 MR. SHUR: It has to be tied to the law. In bribery
23 cases involving campaign contributions, I've seen theory of
24 defense instructions that it lays out and says the defense's
25 theory that the campaign contributions were given for X, Y, Z.

FBJYSIL3

1 If you find that, then a quid pro quo has not been
2 established under the law, and you have to find the defendant
3 not guilty.

4 MR. GOLDSTEIN: Campaign contribution cases are unique
5 in terms of what courts are requiring courts to say -- it
6 cannot be that.

7 THE COURT: Don't get bogged down with that. The
8 point being that the theory of defense includes the notion that
9 if the government has failed to prove something more than that
10 or, depending on how it's phrased, then the government hasn't
11 proven its case basically.

12 That is to say, the legal argument they're making,
13 whatever -- everything else that's in the charge is true.

14 The defendant says the government has not proven that
15 things of value were given to Mr. Silver were other than his
16 understanding was it was simply to curry favor, generalized
17 goodwill, etc., etc. If the government has -- the question is
18 how to phrase it.

19 Essentially, if they buy that, then quid pro quo
20 hasn't been proven.

21 MR. GOLDSTEIN: I understand that as a theoretical
22 matter. It depends on what they are stating their theory is.
23 One difficulty with this generalized goodwill concept with
24 respect to the facts of this case is you have --

25 THE COURT: Mixed motives.

FBJYSIL3

1 MR. GOLDSTEIN: There's mixed motives, by you also
2 have real estate developers who have very concrete legislative
3 things that are on their minds, and the idea that Mr. Silver
4 could think that, oh, all they're doing is just generally
5 trying to get my goodwill is -- is a potential defense.

6 THE COURT: But if that's what the jury concludes -- I
7 understand. Your point is how could they possibly conclude
8 that. That's --

9 MR. SHUR: That's summation.

10 THE COURT: Exactly. But if they do, if they do
11 conclude that Glenwood and Witkoff didn't have in their head
12 80/20 programs and this program and that program, they were
13 just trying to make sure Sheldon Silver picked up the phone
14 when they called, you lose.

15 (Continued on next page)
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FBJ5sil4

charge conference

1 MR. GOLDSTEIN: Because I guess as a matter of how one
2 defines, and the problem is the word generalized goodwill, the
3 way that they describe and the way they asked the questions in
4 the case I think makes a jury potentially think that
5 generalized goodwill is broader than it really is in this
6 context.

7 THE COURT: That argument sort of, I think, cries out
8 a little bit for the sort of the how we dealt with mesothelioma
9 leads, right? If they've only proven this, that's not enough.

10 MS. COHEN: But.

11 MR. GOLDSTEIN: You have the --

12 THE COURT: If you have proven this, if there is mixed
13 motives, specific desire for -- I'm not quite sure how that
14 would be worded but that is to draw for the jury the
15 distinction between what the defense is arguing, which the jury
16 will be charged, if that's what they find, that there is not a
17 conviction.

18 MS. COHEN: I guess -- I mean I thought that -- I
19 don't know that the defense is entitled to its own specific
20 charge on each of the elements; if you don't find this, you
21 find that.

22 THE COURT: No, no, no. That's not what I'm talking
23 about.

24 MS. COHEN: Okay.

25 THE COURT: But the purpose of a defense theory charge

FBJ5sil4

charge conference

1 is to make sure that the jury understands that if -- if they
2 buy the defense argument, that that is a legal -- I'm not sure
3 that it is really a legal defense, it really is that the
4 government hasn't proved their case.

5 MS. COHEN: I think it is different if you have advice
6 of counsel, you give advice of counsel on separate charge.

7 THE COURT: Right. But their defense theory in this
8 case is that the things that were given were not given in
9 exchange for public action. They were given to make sure that
10 he picked up the phone when they called.

11 MR. McDONALD: Picked up -- if they gave it so that he
12 would pick up the phone when they call, that is not enough to
13 acquit.

14 THE COURT: I'm trying to get it into *Ganim*
15 vernacular.

16 MR. McDONALD: It is difficult to have the discussion
17 in the abstract because we don't -- you know, they called in
18 June of 2011.

19 THE COURT: And he took the meeting.

20 MR. McDONALD: And he took the call and took the
21 meeting. That's clearly enough to convict.

22 MS. COHEN: I think the way your Honor has described
23 it addresses that concern.

24 MR. KRY: We are not making up the legal standard.
25 This is an instruction that has been approved by the Second

FBJ5sil4

charge conference

1 Circuit and it is either a correct statement of the law or it
2 is not. And if the government thinks it is not a correct
3 statement, then they should say so. If it is a correct
4 statement, then it is only reasonable and fair that the defense
5 be able to prove that this is our theory and if you find that
6 theory is correct, then the government has failed to meet its
7 burden of proof.

8 I don't know what step of that is objectionable.

9 THE COURT: I think the question is how to word it in
10 the context of this case.

11 MR. KRY: We think that the *Ganim* language that has
12 been approved by the Court of Appeals is talking about what our
13 defense in this case would be so there is not really any need
14 to tinker with it at all.

15 THE COURT: What were the facts in *Ganim*?

16 MR. McDONALD: The mayor of Bridgeport, Connecticut,
17 met a couple people, had a media -- had two people in his state
18 who had companies and they were outside businesses who were
19 paying money, funneling into companies that were then sent up
20 to the Mayor --

21 THE COURT: Unbeknownst, it was not clear that the
22 payors knew it was going to the mayor.

23 MR. McDONALD: That was one of the defenses.

24 MS. COHEN: That was one.

25 MR. McDONALD: And there was a conspiracy charge

FBJ5sil4

charge conference

1 there. Two differences, it was a conspiracy charge there and
2 question of knowledge.

3 MR. MASTER: By the way, once and future mayor; he got
4 out of jail and won again.

5 THE COURT: I guess he was a good man.

6 Can you show me in *Ganim* where it is?

7 MR. KRY: Right there. That paragraph.

8 MS. COHEN: What paragraph?

9 MR. KRY: Page 149, the sentence that starts: Bribery
10 is not proved if...

11 THE COURT: I might be confusing this one with another
12 one but they quote the Hobbs Act charge.

13 MR. KRY: This one did involve both Hobbs Act and
14 bribery counts -- or honest services, rather.

15 THE COURT: This is where I got that language from.
16 To me, the language that I dropped out was the notion of
17 whether the property was given sort of for innocent reason,
18 that's the language they use. So, to satisfy this element the
19 government must prove that the defendant obtained a payment
20 which he knew he was not entitled by use of his office.
21 Knowing that the payment was made in return for official acts,
22 rather than being given voluntarily or unrelated to the
23 defendant's official position. That doesn't quite capture your
24 "it is just used to curry favor."

25 MR. KRY: Right, or foster a relationship.

FBJ5sil4

charge conference

1 MR. MASTER: There is nothing --

2 MR. KRY: Cultivating a relationship. Sorry.

3 THE COURT: So this paragraph, as a whole, really sort
4 of contrasts bribery to lobbying, something that I do not
5 believe that a jury is going to conclude was going on here but
6 if that -- if -- what you want to do is to have me say this
7 without the "that describes legal lobbying," which in some ways
8 makes this feel different than I think what the Second Circuit
9 was talking about.

10 MR. KRY: Well, our position would be that things of
11 value given just to curry favor or generalized goodwill aren't
12 *quid pro quos* whether they arise in the lobbying context or
13 some other context.

14 THE COURT: But the way that the Circuit is blessing a
15 charge that contrasts three things: Bribery from legal
16 lobbying, from campaign contributions.

17 MR. KRY: So this -- this -- well, this specific
18 paragraph is, I guess, bribery from legal lobbying and because
19 lobbying was the issue there but the reason why that contrast
20 exists is that if a lobbyist is just trying to curry
21 generalized goodwill or build a relationship there is -- you
22 know, there is no *quid pro quo*. So that -- the same reason
23 that distinction exists is according to the defendant's theory
24 of the case here, the reason why Mr. Silver is not guilty.
25 Because if a jury concludes that all that was going on here

FBJ5sil4

charge conference

1 were efforts to curry generalized goodwill and build a
2 relationship, then that's not enough. It is not a *quid pro quo*
3 and that is true in the lobbying context and any other context.
4 But, that is just the opposite of what a *quid pro quo* is. It
5 is not an exchange of things of value for official acts.

6 MR. McDONALD: It is the lobbying context that
7 makes -- I mean, the charge rose here and the Second Circuit
8 didn't adopt the language. It was reviewing the stream of
9 benefits part of the instruction and we think that in this
10 context an instruction that says a generalized goodwill
11 instruction like this, one, focuses the intent on the giver and
12 not on the defendant; two --

13 THE COURT: No, no, but it can be focused on him. It
14 can be focused on his intent.

15 MR. McDONALD: -- and two, is confusing given the
16 other different instructions that would be included in the
17 charge, for example the mixed motive instruction. I mean, this
18 charge makes it -- if the giver acts partially out of
19 goodwill -- or, sorry, if the defendant's intent is motivated
20 partially out of goodwill and partially out of corrupted intent
21 then --

22 THE COURT: That's enough.

23 MR. McDONALD: That's enough. Exactly.

24 THE COURT: But if it is not -- look. I think they've
25 got a point and my concern is that if I don't incorporate into

FBJ5sil4

charge conference

1 here whether it is in a defense theory or affirmatively in
2 these elements, it is reversible and you don't want that.

3 MS. COHEN: Certainly not.

4 THE COURT: I realize that in order to get reversed
5 you have to get a conviction, I'm well aware of that, but the
6 fact is they're entitled -- I mean this is -- if that's all
7 that was going on he is not guilty. You have got a lot of
8 evidence to point to to show that wasn't what was going on.

9 MR. McDONALD: I guess it depends on what the "that"
10 is.

11 THE COURT: The "that" is this concept. So, it would
12 be bribery is not proved or *quid pro quo* was not proved if the
13 benefit was accepted as simply an effort to buy favor or
14 generalized goodwill.

15 MR. MASTER: Instead of "simply" we would substitute
16 "solely."

17 MR. KRY: That's slanted.

18 MS. COHEN: May I suggest, your Honor, that we take it
19 back, we try to draft something, and then defense can redline
20 it or do whatever they want and we can submit it to your Honor
21 rather than try here to parse it out? We hear what you are
22 saying.

23 THE COURT: That's fine.

24 Submit something to them.

25 MR. SHUR: Is this the defense theory of the case

FBJ5sil4

charge conference

1 instruction?

2 MS. COHEN: No, or --

3 MR. SHUR: Or are you thinking of incorporating it?

4 THE COURT: I think it should be incorporated into
5 element two of both the honest services and the extortion is
6 where it goes.

7 MS. COHEN: Element two for both, your Honor?

8 THE COURT: Maybe element -- no. It is actually
9 element three of fraud. Element three of fraud, element two of
10 extortion incorporating this concept but with the focus on what
11 is in Silver's head as opposed to the givers. Okay? So I want
12 you to give them a proposal by 9:00 tomorrow morning. I want
13 you to give me a redline of their proposal by noon. Okay?
14 Okay.

15 I'm not sure whether that goes into element two or
16 element three of Hobbs Act but you have got the idea, okay?

17 MR. KRY: Thank you.

18 THE COURT: Okay, what next?

19 MR. KRY: Page 24, lines 4 to 5.

20 MS. COHEN: So, your Honor, we have something before
21 that.

22 MR. GOLDSTEIN: Bottom of 23.

23 MS. COHEN: The bottom of 23 is gone so we don't have
24 that.

25 THE COURT: Right, 23, that second paragraph is likely

FBJ5sil4

charge conference

1 out.

2 MS. COHEN: Right.

3 THE COURT: But that's -- I need to consider whether
4 that makes sense with the expanded first paragraph, whether the
5 second paragraph becomes repetitive.

6 MS. COHEN: So, we have page 24 what is I think now
7 going to be first paragraph but it starts line 3.

8 THE COURT: Is that where you are too?

9 MR. KRY: Yes.

10 THE COURT: Okay.

11 MS. COHEN: So it begins page 24, line 3 begins:
12 Again, as I charged you earlier, it is not necessary that the
13 official and -- we would just add and/or.

14 THE COURT: That would be just or.

15 MS. COHEN: Or the person giving the property state
16 the *quid pro quo* in express terms. The next sentence is fine.
17 Then the third sentence --

18 THE COURT: The defense doesn't like the second
19 sentence.

20 MS. COHEN: I know, but if I can just finish ours it
21 will maybe be easier to follow.

22 THE COURT: Okay.

23 MS. COHEN: *Quid pro quo*, take out the word
24 "relationship," can be implied from Mr. Silver's words and
25 actions so long as -- and then we would rather have -- so long

FBJ5sil4

charge conference

1 as Mr. Silver obtained property aware that the extorted parties
2 were motivated by Mr. Silver's role as a public official or his
3 control or influence over a public officials.

4 It is in our letter at page 4.

5 MR. KRY: Can I respond to that?

6 THE COURT: Yes.

7 MR. KRY: So, we are fine with changing the "or." We
8 are fine with dropping the word relationship. We do object to
9 the second sentence, the concept that it doesn't need to be
10 addressed is already pretty clearly conveyed by the first and
11 third sentences and the second one is really just kind of
12 commentary that could be read to imply that this is what was
13 going on here so we would request that that be removed. And
14 then, with respect to the government's revision to the last
15 sentence, we don't agree with that. I mean, we do think that
16 so long as Mr. Silver intends there to be a *quid pro quo* needs
17 to stay in.

18 MS. COHEN: Our feeling is it is in because it says a
19 *quid pro quo* can be implied. Twice.

20 MR. KRY: It is the intends, that's the point. The
21 relationship can be implied if that's what he intends.

22 MR. MASTER: So delete the "and the person who was
23 giving property also understands that" --

24 THE COURT: That's what I would.

25 MS. COHEN: You are fine with that out?

FBJ5sil4

charge conference

1 MR. KRY: If you want to rephrase that in terms of
2 what you think you have to show for extortion in terms of
3 the -- so, if what we have is that so long as Mr. Silver
4 intends there to be a *quid pro quo*.

5 THE COURT: Period.

6 MS. COHEN: Period.

7 MR. KRY: No, and the person who is giving the
8 property and then whatever reason you had for that would be
9 fine, like the official position.

10 MR. MASTER: Our proposal was deletion.

11 MR. KRY: You know, I am fine with just deleting it.

12 THE COURT: Okay. I think that does it.

13 MS. COHEN: Okay.

14 MR. KRY: It is covered elsewhere.

15 MS. COHEN: Right.

16 THE COURT: I agree.

17 MS. COHEN: Your Honor, it would read a *quid pro quo*
18 can be implied from Mr. Silver's words and actions so long as
19 Mr. Silver obtained property aware that the extorted parties
20 were motivated by Mr. Silver's role.

21 THE COURT: No. It would be a *quid pro quo* can be
22 implied from Mr. Silver's words and actions so long as
23 Mr. Silver intends there to be a *quid pro quo*.

24 MR. MASTER: Okay.

25 MS. COHEN: Okay.

FBJ5sil4

charge conference

1 MR. MASTER: Fine.

2 MS. COHEN: That's fine.

3 THE COURT: Okay.

4 MS. COHEN: Intends there to be a *quid pro quo*.

5 MR. KRY: Lines 9 to 13 on that page is the
6 third-party extortion theory.

7 THE COURT: Yes.

8 MR. KRY: This is another one where your Honor ruled
9 against us on the motion to dismiss so we just note our
10 objection to that.

11 THE COURT: Okay.

12 MR. KRY: We didn't have anything until page 29.

13 THE COURT: You had 24, line 19.

14 MR. KRY: Yes, I think that was --

15 MS. COHEN: The government's page 24, lines 15 to 18?

16 THE COURT: No, no. It is the defense. I am looking
17 at defense.

18 MR. KRY: I'm sorry. You are quite right. Yes, that
19 should be official acts rather than official position if we are
20 talk about the *quid pro quo*.

21 THE COURT: This is not exact -- this is misuse of the
22 official position.

23 MR. KRY: As I read the paragraph it is talking about
24 what the elements of the *quid pro quo* relationship are.

25 MS. COHEN: What line are you on? Mitch, what line

FBJ5sil4

charge conference

1 are you on?

2 MR. KRY: Line 19 of page 24.

3 MS. COHEN: Okay.

4 MR. KRY: And the proposed change would be to change
5 Mr. Silver's official position to Mr. Silver's official acts.

6 MS. COHEN: No.

7 MR. MASTER: This is where we get to the concept that
8 Mr. McDonald was talking about. This is an act for a
9 statement.

10 MS. COHEN: Of the law.

11 MR. MASTER: This is routinely given in this district.

12 THE COURT: I thought this was almost directly from
13 Sand, actually.

14 MR. MASTER: Yes.

15 MS. COHEN: It is, your Honor.

16 THE COURT: Not that Sand can't be wrong but he is
17 usually right.

18 MR. KRY: Yes. I guess this is the same issue we
19 talked about earlier.

20 THE COURT: Okay. Overruled.

21 MS. COHEN: Your Honor, we are still on page 24.

22 THE COURT: Oh we are? Okay.

23 MS. COHEN: Because the government had something,
24 lines 15 to 18.

25 THE COURT: Okay.

FBJ5sil4

charge conference

1 MR. KRY: I think we already talked about that.

2 MS. COHEN: We did?

3 MR. KRY: Oh no. I'm sorry.

4 MS. COHEN: We didn't.

5 MR. KRY: We object to that.

6 MS. COHEN: Okay.

7 THE COURT: 15 to 18.

8 I think that is from Sand.

9 MS. COHEN: That meaning our proposal?

10 THE COURT: No, my language. Maybe not, but -- maybe
11 not. Maybe not.

12 MS. COHEN: It is just to put in the concept that the
13 extorted party has to be motivated in part.

14 THE COURT: I'm fine with inserting after motivated,
15 "at least in part."

16 Are you objecting to the balance of that sentence?
17 So, whether the extorted party was motivated at least in part
18 to give property because of a belief that Mr. Silver would take
19 official action in exchange for the property or for some other
20 entirely innocent reason.

21 MS. COHEN: I think that it is clearer to say
22 Mr. Silver's role as a public official or his control or
23 influence over public officials which is language we used
24 before in the charge.

25 THE COURT: But, see, this is the *quid pro quo* so this

FBJ5sil4

charge conference

1 is --

2 MS. COHEN: It is the same instruction on the prior
3 page which we now might have deleted, but.

4 MR. KRY: Right, the *quid pro quo* is separate, that is
5 separate from *McDonough* requirement so we agree it should stay
6 the way it is written.

7 MS. COHEN: What does Sand say?

8 THE COURT: Okay, so I'm going to take it in part,
9 your change in part and reject it in part so it will read: "If
10 you find either to be the case, however, each is a factor that
11 you should consider in deciding whether the extorted party was
12 motivated, at least in part, to give property because of a
13 belief that Mr. Silver would take official action in exchange
14 for the property rather than for some other entirely innocent
15 reason."

16 MR. MASTER: I think we would like to delete the word
17 "relationship" on line 15.

18 THE COURT: Okay. What's next? I can't figure if
19 y'all are pooped out from money laundering the same way I am.
20 It looks like you are.

21 MR. KRY: 29, this is a willfully causing instruction.

22 THE COURT: Okay, so there is a long story behind
23 willfully causing and me.

24 In an early criminal trial I had I thought you're not
25 trying willfully causing, you tried this case on principal

FBJ5sil4

charge conference

1 theme. Government, do you object? Nah, we don't object.
2 You're right, we tried it on principal theory. As God as my
3 witness the first note was, well, suppose we find he didn't do
4 it but he was part of the scheme. I said okay, never again am
5 I going to drop a Section 2 charge when it is indicted.

6 MR. MASTER: We indicted it.

7 MS. COHEN: We indicted it.

8 THE COURT: They indicted it.

9 MR. KRY: It is still a question whether it is
10 supported by the evidence.

11 THE COURT: It is all supported by the evidence and
12 Section 2 is implicit in every case.

13 MR. MASTER: We would like it.

14 MR. KRY: I'm sure they would. I'm not -- you know
15 that's not --

16 THE COURT: What are you concerned about?

17 MR. KRY: Well, it is a charge that gives the jury
18 another way to find Mr. Silver guilty and those sorts of
19 charges shouldn't be given unless there is an evidentiary basis
20 for them. I'm not sure what it is what the government is
21 getting at.

22 MS. COHEN: Since it is always included in the offense
23 there is always evidentiary basis for it.

24 MR. MASTER: And Mr. Silver is a leader who acts
25 through others, in other words he has people send out faxes for

FBJ5sil4

charge conference

1 him, he has people who process grants for him.

2 THE COURT: Right, so that's how it could come up.

3 Again, I was on your side until I got burned by that
4 whole damn Section 2 problem. The way it can come up is
5 because the jury gets wrapped around the axle on the fact that
6 Mr. Silver himself didn't cut a check for a grant so he didn't
7 do it, somebody else did it. Is that sufficient? And as soon
8 as that note comes out you have got a Section 2 issue. It is
9 not he doesn't have to do it, the benefits can go back, other
10 people can do it. I don't even -- so, I appreciate your
11 sentiment. Overruled.

12 MR. KRY: Okay.

13 THE COURT: You don't object to the actual wording of
14 the charge, just the charge at all, right?

15 MR. KRY: Just the charge.

16 THE COURT: Venue. Is the defense contesting venue?

17 MR. MOLO: Mr. Kry and I have a secret history in the
18 Second Circuit on venue.

19 THE COURT: Sounds like me and Section 2.

20 MR. MOLO: We are not popular in the Eastern District,
21 but anyway. I don't think we are popular in the Southern
22 District I just might add.

23 THE COURT: I was just going to say.

24 MR. MOLO: But no, I don't think there is an issue.

25 MR. KRY: Yes, except to the extent venue is always an

FBJ5sil4

charge conference

1 issue.

2 MR. MOLO: There has got to be --

3 THE COURT: You want a charge on it?

4 MR. MOLO: Definitely.

5 THE COURT: That's what I was asking, if I could
6 dispense with it.

7 MR. MOLO: Definitely.

8 THE COURT: Okay.

9 MR. KRY: Then on page 30, the false exculpatory
10 statement instruction, this just struck us as unnecessarily
11 emphasizing one aspect of the government's case. This would be
12 the government's theories on this topic will be part of the
13 body of evidence the jury can consider and there is no reason
14 to single it out and give it special elements.

15 MR. MASTER: Your Honor, this is a charge that's
16 regularly given in the district. It conforms with Judge Sand.
17 We have satisfied the factual predicate for it.

18 THE COURT: It was actually in brackets because when I
19 wrote this it was before I heard any of the press statements.
20 I think the government is entitled to the charge. I am happy
21 to move it someplace else if you would like it someplace else.

22 MR. KRY: That's fine.

23 THE COURT: Okay.

24 MR. KRY: And then we have our series of additional
25 instructions.

FBJ5sil4

charge conference

1 THE COURT: Okay.

2 MR. KRY: So, the first one is outside jobs and
3 income. New York State law allows state legislators to hold
4 outside job and make outside income. There is no limit as to
5 the amount of income they may save from that outside job. You
6 may not find Mr. Silver guilty merely because he worked
7 part-time as a lawyer.

8 THE COURT: Okay. Denied.

9 MR. KRY: The second one is --

10 THE COURT: Referral fees. So, here is one of my
11 issues with this. Everybody has been trying this case as
12 though that is a correct statement of law. I'm not actually
13 persuaded that it is. My understanding is that New York
14 ethical law requires there to be some proportionality between
15 the fee and the work -- you are shaking your head no.

16 MR. COHEN: No.

17 MR. KRY: It is actually in the footnote.

18 THE COURT: Mr. Silver is shaking his head no but I'm
19 not taking legal advice from him.

20 MR. KRY: In the footnote the rule is quoted, which
21 may shed some light on this.

22 MR. COHEN: If he signs on, that's obviously an issue
23 in the case.

24 MR. KRY: Yes, so it is either or.

25 THE COURT: Of course, there was for many years that

FBJ5sil4

charge conference

1 was not complied with in connection with Goldberg. He was
2 still getting referral fees.

3 MS. COHEN: Correct.

4 MR. MASTER: It was never complied with.

5 THE COURT: I don't think most other lawyers are
6 getting referral fees under those circumstances but, be that as
7 it may, I don't -- look. You have argued the case that this is
8 not about the legality of referral fees but I don't think the
9 charge is -- that's not --

10 MR. COHEN: Certainly the ethics of it.

11 THE COURT: I'm sorry?

12 MR. COHEN: Or certainly not about the ethics of them.

13 THE COURT: That's my concern. I don't know that
14 anybody else has a concern about that.

15 MS. COHEN: The government, as we did in our motions
16 *in limine*, we don't want this charge. We don't think you
17 should give it to the jury.

18 THE COURT: I don't think it is necessary.

19 MR. KRY: If it is a question of accuracy we would
20 also proffer a charge saying something like it is not generally
21 unlawful or unethical because we are also concerned about the
22 jury inferring any time there is referral fees for bringing in
23 business it is automatically something improper. We can debate
24 the specific circumstances but we also just want to negate
25 that.

FBJ5sil4

charge conference

1 THE COURT: But there was absolutely no evidence of
2 that. Every person who was asked said it was proper and
3 acceptable. So, denied.

4 MR. KRY: The third one is on the disclosure forms.
5 It says: Mr. Silver has not been charged with any crime based
6 on the way in which he filled out the state financial
7 disclosure forms. You may not find Mr. Silver guilty merely
8 because you believe he should have disclosed more information
9 or different information on his disclosure forms.

10 This is a pretty significant issue in the case. It
11 came up before that there is a risk that the jury may conclude
12 that how the disclosure forms were filled out is one of the
13 crimes at issue in the case when it is not and we need some
14 sort of instruction to clarify that that is just not what's at
15 issue in the case. This was a pretty salient topic of the
16 government's presentation and so we can't leave that impression
17 with the jury without some kind of instruction on it.

18 MR. MASTER: We disagree and this applies to statement
19 instruction no. 3 and 4 because it also details with
20 statements. There is another instruction about statements to
21 the press. As we have said, it is actually not the case that
22 he was not charged with a crime related to the way in which he
23 filled out statements, disclosure forms and statements to the
24 press because, again, as part of honest services fraud we have
25 to prove intent to defraud and material misrepresentations or

FBJ5sil4

charge conference

1 omissions or part of that. This is part of our case and it is
2 proof of his consciousness of guilt as well as proof of one of
3 the elements of that charge. So, the idea that this is -- and
4 we are entitled to put together the proof that is relevant to
5 those charges, so.

6 MR. KRY: The instruction doesn't say you can't
7 consider it, it just says you can't find him guilty merely
8 because you believe.

9 MS. COHEN: I would also add the instruction is about
10 what he is not charged with. There is a lot of things he is
11 not charged with and the charge is very clear about what he is
12 being charged with.

13 MR. MOLO: This particular issue, though, Judge, and I
14 agree with your notion of not telling the jury about what he is
15 not charged with but on this specific point, and this gets back
16 to, there was a lot of debate over whether or not this ought to
17 be admitted at all and then we had the back and forth as to
18 what level it should be, the opportunity for the jury to be
19 confused on this point, specifically, about him making a false
20 statement and that is somehow constituting a crime is much
21 higher than it is than it is in these others areas.

22 As to Mr. Kry's point it does say you cannot find him
23 guilty merely because, it does not say you can't consider it as
24 circumstantial evidence of his intent.

25 THE COURT: Well, if I was going to give the charge I

FBJ5sil4

charge conference

1 would want it balanced. That is to say you can't find him
2 guilty merely because you find he should have disclosed more
3 information or disclosed in a different way. But, if you find
4 that he did not fully disclose his financial circumstances or
5 however it would be worded, that is circumstantial evidence
6 that you can consider for purposes of --

7 MR. MASTER: Consciousness of guilt and the fraud and
8 whether he is in fact guilty of honest services fraud.

9 THE COURT: Then the question would be where should
10 that go.

11 MS. COHEN: I think it is very clear from your charge
12 that this is not what the crime is.

13 THE COURT: I agree, but I am inclined to --

14 MR. MOLO: Let us draft something and --

15 THE COURT: Okay. It has to be balanced.

16 MR. MOLO: I understand.

17 THE COURT: So are you going to go in the opposite
18 direction; 9 a.m. to them, noon to me. I am inclined on the
19 financial disclosure form, I am not inclined on the statements
20 to the press. I think it's clear exactly why they put in
21 statements to the press and it is clear that he is not being
22 charged with lying to the press. It is clear that it is being
23 used as circumstantial evidence that he was trying to cover up
24 his relationship with Glenwood and Witkoff as well as with
25 Taub. That's the claim. Whether the jury buys it or not is a

FBJ5sil4

charge conference

1 different issue.

2 MR. KRY: Okay, no. 5 is the state grants process.

3 THE COURT: Not to mention the fact that if people
4 were charged for lying to the press everybody would be in the
5 stocks.

6 MR. KRY: State grants process: You heard testimony
7 in this case about whether certain grants that Mr. Silver
8 awarded were subject to competitive bidding or peer review. I
9 instruct you that there is no requirement under New York Law
10 that those grant proposals be subjected to competitive peer
11 review. You may not find Mr. Silver guilty merely because he
12 recommended a grant without that process.

13 THE COURT: So, again, I wouldn't give that charge
14 unless it was balanced and I am not -- I am inclined to say no
15 because I don't want to go down this track of this alone is not
16 enough but you can consider this for that because, as I think
17 we discussed yesterday or the day before, there was never a
18 suggestion that the lack of a peer review made it illegal.
19 There was the suggestion that the lack of a peer review further
20 confirmed the evidence that it was purely a unilateral decision
21 by the Speaker to give the grant. This was not a matter of
22 scientific review, it wasn't a matter of peer review. There
23 was nothing beyond Mr. Silver which may have been for good
24 reasons -- your argument it was good research, could have been
25 for bad reasons, the government's case that he was doing it as

FBJ5sil4

charge conference

1 a *quid pro quo* with Dr. Taub.

2 So, I don't think and I can't imagine either side is
3 going to make any arguments in summation that is going to in
4 any way suggest that it is illegal because there was no peer
5 review.

6 MR. KRY: There is still a concern that there were a
7 number -- I mean, they're all cited here in the footnote where
8 this topic came out and in addition to the point your Honor
9 just made, I think the he implication there is that the fact
10 that these were not given without competitive bidding somehow
11 insinuated that they were improper. And so, I do think an
12 instruction along those lines is appropriate. If the concern
13 is that this instruction is not balanced enough we could
14 propose a balanced instruction to the government on the same
15 schedule as for the other one.

16 MS. COHEN: No. This is a very different issue. We
17 cannot have every fact in this case be this isn't -- you know,
18 that every testimony isn't a crime. We can't go down that
19 road. And you are right, your Honor, we are using it that that
20 created the opportunity whereby Silver could commit the crime.
21 We have never argued the other.

22 THE COURT: Overruled. I am not giving that one even
23 if it is.

24 MR. KRY: This next one is 6, sending a message :
25 Mr. Silver, like any defendant, is entitled to be tried on the

FBJ5sil4

charge conference

1 charges in the indictment and only on those charges. You may
2 not convict Mr. Silver in order to send a message to the public
3 or to the community at large and this is supported by a number
4 of cases.

5 Often this issue comes up in the context of arguments
6 made to the jury and whether they're appropriate but it is
7 equally true as a statement of law and we think appropriate for
8 an instruction.

9 MR. MASTER: Your Honor, I think if we were to make an
10 improper argument in summation, rebuttal summation, perhaps a
11 corrective instruction would be warranted, but I have never
12 seen such an instruction given in the absence of the misconduct
13 that's described in that footnote.

14 THE COURT: If I hear arguments like that in summation
15 I will give the charge but otherwise I'm not going to. I don't
16 anticipate hearing such arguments.

17 MR. KRY: No. 7 is the statute of limitations and this
18 instruction says: That the statute of limitations for the
19 charges here is five years. That means that if you find that
20 Mr. Silver committed any of the alleged acts constituting
21 honest services fraud, extortion, or money laundering before
22 February 19th, 2010, you may not find Mr. Silver guilty on the
23 basis of those acts.

24 That's a legally correct statement of the law. It is
25 definitely implicated by the facts here particularly because

FBJ5sil4

charge conference

1 the State grants were before that date. So some of the key
2 official acts that we are relying on, at least for the
3 mesothelioma piece of the case, are outside the statute of
4 limitations and we think the jury should be instructed that
5 they can't find Mr. Silver guilty based on those acts.

6 MS. COHEN: Your Honor, we alleged a scheme.

7 THE COURT: Scheme.

8 MR. MASTER: It is a scheme.

9 MS. COHEN: Correct.

10 MR. MASTER: And this is actually a misleading
11 description of what a statute of limitations is.

12 MS. COHEN: Correct.

13 MR. MASTER: It says: If you find that he committed
14 any of them before February 19th, 2010 you may not find him
15 guilty. So, therefore, if a grant was given in 2005 you must
16 find him not guilty. That doesn't make any sense.

17 THE COURT: It would have to be that no part of the
18 scheme continued beyond February 19th, 2010.

19 MR. KRY: Okay, well that would still certainly be
20 better than no instruction on it.

21 MS. COHEN: No.

22 MR. MASTER: I mean if the scheme concluded -- are you
23 really saying that the scheme --

24 MR. KRY: Yes.

25 MS. COHEN: Then you should have done a motion --

FBJ5sil4

charge conference

1 MR. KRY: There is no requirement that you --

2 MS. COHEN: -- before jury charge.

3 MR. KRY: Sure, there is, because the jury could find
4 that -- the situation we are concerned about is what if the
5 only issues on which the jury is undecided are the state grants
6 and everything else. If it is clear there is not evidence of
7 *quid pro quo* then we re entitled to an instruction that says
8 that only if the jury finds that constitutes a scheme are
9 things that ended seven or eight years ago then he can't be
10 found guilty.

11 THE COURT: It is if the scheme ended more than five
12 years ago?

13 MR. KRY: Right.

14 THE COURT: We are more than five years.

15 MS. COHEN: But the scheme ended.

16 MR. KRY: Sure, there is. All the evidence where, for
17 example, there were repeated denials that all of later things
18 that were done were not done in exchange for official facts.
19 The jury could easily conclude that. The only thing that is
20 even questionable are the state grants and that everything else
21 is not even a close question and in those circumstances we are
22 entitled to a statute of limitations defense.

23 MS. COHEN: That's not --

24 MR. GOLDSTEIN: I'm not sure it is true as a legal
25 matter if he continued receipt of referral fees for patients

FBJ5sil4

charge conference

1 that he obtained.

2 THE COURT: The question is is that part of the
3 scheme. The issue is did the scheme continue.

4 MS. COHEN: Yes. I think we presented substantial
5 evidence.

6 MR. SHUR: The problem is that the jury could find
7 that the scheme ended before the statute of limitations.

8 THE COURT: Right. I have got your point.

9 MR. COHEN: Yes, we should shut up now.

10 THE COURT: Okay, so this is incorrect because you
11 have got the words in the wrong way.

12 MR. MOLO: We will correct it.

13 MS. COHEN: We are going to do 9:00 to noon?

14 THE COURT: 9:00 to noon; and also include in that a
15 suggestion of where you want to put that.

16 MR. KRY: I think this would just go at the end of the
17 section we were just looking at on page 31.

18 There is one other instruction we gave to the
19 government earlier today which is no. 8, if I can pass that up.

20 MS. COHEN: Is this the stand-alone instruction you
21 wanted?

22 MR. KRY: Yup, or it could go in a different section
23 but stand-alone would be fine and it just says: To prove an
24 official act, the government must prove the exercise of actual
25 governmental power, threat to exercise such power or pressure

FBJ5sil4

charge conference

1 imposed on others to exercise actual governmental power.

2 We had a different official act instruction in our
3 original proposal. The Court's proposed instructions don't
4 define the term at all. This one is relevant because there are
5 a number of other circuits out there that have adopted this
6 particular standard and we think it needs some sort of
7 definition.

8 MR. McDONALD: Your Honor, under the color of official
9 authority definition is one that's been repeatedly used by the
10 Second Circuit, it is one that's been routinely given in this
11 district. It was recently used by Judge Wood in the public
12 corruption case that is pending before her in denying a motion
13 to dismiss. It's --

14 MR. MASTER: *Rosen*.

15 MR. McDONALD: Yes, it is used in *Rosen*. It is
16 used -- it has been -- it has been used time and time again in
17 this circuit and the cases that are decided are from out of
18 circuit and incorporates different concepts that --

19 THE COURT: What are you saying? I covered this
20 already?

21 MR. McDONALD: Yes. Exactly, your Honor.

22 THE COURT: What page?

23 MR. McDONALD: Bottom of page 18.

24 THE COURT: Official action includes any action taken
25 or to be taken under color of official authority.

FBJ5sil4

charge conference

1 MR. MASTER: And so that's the Second Circuit
2 standard. Different circuits have adopted other slightly
3 different --

4 THE COURT: Language.

5 MR. MASTER: Like the Fourth Circuit does modified
6 standard. And these are all out of cases that Mr. Kry is
7 citing. They're not the governing law in this district so we
8 think that the instruction on this issue that is in the charge
9 is the correct instruction.

10 MR. KRY: And I mean it is correct that this is
11 supported by out-of-circuit authority. We still think that's a
12 correct statement of the law.

13 THE COURT: You know what I think? I think that's
14 more words that just say the same thing.

15 MR. KRY: I'm not sure we agree, but.

16 THE COURT: Okay. Well, denied.

17 MS. COHEN: At the risk of incurring wrath I just have
18 a comma that the government would like added on page 14, line 9
19 after the word Dr. Taub. We just think there has to be a
20 comma.

21 THE COURT: Why does there need to be a comma there?

22 MS. COHEN: To make it clear the government is only
23 required to prove that Silver had the corrupt intent. Just to
24 set that off.

25 THE COURT: A comma on line 9?

FBJ5sil4

charge conference

1 MR. MASTER: Of page 14.

2 MS. COHEN: Yes; page 14, line 9, to set off the leads
3 for which were given to Dr. Taub, comma, in exchange.

4 THE COURT: Okay. Does defense object to that?

5 MR. KRY: That's pretty subtle.

6 THE COURT: I don't think it matters but I'm happy to
7 put it in.

8 MS. COHEN: Thank you, your Honor.

9 THE COURT: Okay, any comments on the verdict form?

10 MS. COHEN: No. Fine with the government, your Honor.

11 THE COURT: Okay. So I expect a submission at noon
12 tomorrow then. We will try to turn it around and get it back
13 to you probably sometime over the weekend so I'm going to ask
14 you to e-mail in if you have -- if you are concerned -- I don't
15 need you to e-mail the concern, I just need you to tell me if
16 you have concerns in which case I will see you at 8:30 Monday
17 morning. Okay? I want you to know what's in the charge before
18 you sum up.

19 MS. COHEN: Right.

20 MR. MASTER: Sure.

21 THE COURT: Okay. So the only way I can accomplish
22 that is if we do it by 8:30 so we should be down to little,
23 minimal issues by then.

24 MR. GOLDSTEIN: If we meet at 8:30 would it be here or
25 downstairs?

FBJ5sil4

charge conference

1 THE COURT: I would say here but the summations are
2 going to be downstairs. It is going to be a zoo downstairs so
3 that's my proposal.

4 You had some very strong views on how long summations
5 were.

6 MR. MOLO: I mean I thought -- I thought I would take
7 two hours or up to two hours and the government wanted I don't
8 know, a day or two, I'm not sure what it was. I thought that
9 is a bit excessive. I don't know.

10 THE COURT: Has the government gotten further -- who
11 is doing summation?

12 MS. COHEN: Mr. Goldstein.

13 MR. GOLDSTEIN: I think that the summation, the main
14 summation will be up to three hours, no more than three hours.

15 THE COURT: Perfect. I was going to give you a
16 three-hour limit so that's perfect.

17 MR. MOLO: For the whole.

18 THE COURT: No. Three hours for the opening
19 summation. I am also going to give you three hours if you need
20 it. If you don't need it, don't use it, but at three hours you
21 will stop.

22 MR. MOLO: I will repeat myself like a loop and they
23 may remember me better.

24 MS. COHEN: And the rebuttal?

25 THE COURT: An hour.

FBJ5sil4

charge conference

1 MS. COHEN: An hour for rebuttal.

2 THE COURT: Okay.

3 MS. COHEN: That's fine.

4 THE COURT: My plan is to give you a break midway on
5 both of you. You can either let me call time at an hour and a
6 half or you can figure out about when you are going to want a
7 break and call it yourself. Just let me know what you want to
8 do.

9 MR. SHUR: Judge, I assume you are not going to charge
10 the jury the same day.

11 THE COURT: No. I can't. This is going to be a full
12 day so I will charge them first thing Tuesday morning. Okay?

13 That was what was on my agenda. Where are you with
14 your last exhibits?

15 MS. COHEN: Defense provided us with several new
16 exhibits and we still have arguments over the other exhibits.

17 THE COURT: Okay, well they have to be resolved so
18 they have to be resolved tonight.

19 MS. COHEN: We are ready.

20 THE COURT: Okay.

21 MS. COHEN: To discuss them now.

22 THE COURT: Let me go get my copy.

23 My little stack of documents was 167, 168, 169, 170,
24 171 and 244. That was the open issues. Are you introducing
25 another document into the open issues?

FBJ5sil4

charge conference

1 MR. SHUR: I don't know that it was an open issue but
2 there was the issue of the HCRA law.

3 THE COURT: Yes.

4 MR. SHUR: So, we have that, if your Honor would like
5 to take a look at it.

6 THE COURT: Great. Can I see it? Is it flagged where
7 in it it mentioned the pool?

8 MR. SHUR: I sure hope so.

9 MS. COHEN: Is this Defendant's Exhibit 137?

10 MR. SHUR: Yes. That's right.

11 So, the areas flagged indicate the priority
12 distribution pool which is the pool that was mentioned during
13 the course of the trial and the fact that it is divvied up
14 between the Speaker on behalf of the Assembly, the Senate
15 Majority Leader on behalf of the Senate, and the Commissioner
16 of the Board of Health.

17 THE COURT: Okay. So, I think the government had
18 already said that you don't object to the bill itself.

19 MS. COHEN: Correct, your Honor.

20 THE COURT: Okay, so 137 is in.

21 MR. SHUR: Did you need a copy, Judge?

22 THE COURT: No.

23 MR. SHUR: Okay.

24 MR. GOLDSTEIN: We look forward to an hour of the
25 summation of the other side going through that bill.

FBJ5sil4

charge conference

1 MR. COHEN: You want us to take three hours there,
2 Andrew?

3 THE COURT: So you had marked another document as 137
4 so it can't be 137.

5 MR. SHUR: Okay.

6 THE COURT: Would you like for me to pick a number for
7 you that you didn't use?

8 MR. SHUR: Please.

9 THE COURT: 82.

10 MS. COHEN: Defense 82.

11 THE COURT: Yes.

12 MR. SHUR: And then the exhibit numbers, Judge, you
13 just mentioned I believe, the progress reports.

14 THE COURT: 82 is okay.

15 The progress reports, right.

16 MS. COHEN: Right.

17 MR. SHUR: I believe Defendant's Exhibit 167 is
18 already admitted as Defendant's Exhibit 17.

19 THE COURT: Okay, so that's irrelevant.

20 MR. GOLDSTEIN: It is?

21 MS. COHEN: I'm not sure that's correct. Let me get
22 my list.

23 MR. GOLDSTEIN: Do you have a copy of 17?

24 MR. SHUR: No, but we can get it. One second.

25 MS. COHEN: Defense 17 is Taub's progress report on

FBJ5sil4

charge conference

1 meso center dated March 1st. I don't know if this is the same
2 one. That's the problem, because these were drafts in the
3 computer. I have no idea if this is the same one.

4 MR. SHUR: The point is --

5 THE COURT: You are withdrawing it.

6 MS. COHEN: Okay.

7 THE COURT: Because it is already in evidence so it is
8 out.

9 MR. SHUR: So, we are doing 168, 169, 170 and 171.

10 THE COURT: One at a time. The question that was
11 supposed --

12 MR. SHUR: Draft or final.

13 THE COURT: What is your evidence that they're final?

14 MR. SHUR: We have no evidence that they're final
15 reports. Our understanding -- we received these from the
16 government. The government indicated that they received them
17 from Dr. Taub from his computer and that they don't know
18 whether they're drafts or finals. The defense's position is
19 regardless, they're relevant to corroborate the fact that the
20 research that was done was legitimate cancer research but
21 wasn't focused on the 9/11 research that was the focus of the
22 grant project regardless of whether they're drafts or finals.

23 THE COURT: No, but it seems to me whether they're
24 drafts or finals does matter as well as to whom he is
25 reporting. So, if he is reporting to someone who is not

FBJ5sil4

charge conference

1 funding anything having to do with 9/11, he is not going to
2 mention, oh, and by the way, this will also be beneficial to
3 people who were exposed to asbestos by 9/11. And these reports
4 were not going back to the state, right?

5 MR. SHUR: Well, I think that goes to the weight of
6 the evidence, Judge.

7 MS. COHEN: Correct, your Honor.

8 MR. SHUR: Because what we have in the record is the
9 fact that, clearly, Dr. Taub understood that Mr. Silver had
10 concerns that the 9/11 research wasn't being done because he
11 prepared talking points addressing that particular concern,
12 talking points that he would use to talk to Mr. Silver.

13 THE COURT: Say the first part of that again? I don't
14 think there is any evidence of the first part of your sentence.

15 MR. SHUR: Well, the fact that Dr. Taub -- and I
16 believe this is part of his testimony as well -- created
17 talking points for a conversation he was going to have with
18 Mr. Silver in which the talking points are specifically focused
19 on addressing the lack of work that was done with respect to
20 the post 9/11 issues.

21 THE COURT: The lack of work? I don't think that's
22 right. I thought it was addressed to the work that was going
23 to be done.

24 MR. SHUR: Right, but -- and there is also a
25 progression of letters that Dr. Taub is sending to Mr. Silver

FBJ5sil4

charge conference

1 in which it is clear he is sort of beefing up, trying to focus
2 on doing the 9/11 work because that's what Mr. Silver's
3 interest was, seeing that work done. And the whole bit about
4 working with Mount Sinai is also focused on addressing that
5 concern that the 9/11 work isn't being done and therefore the
6 funding could stop.

7 THE COURT: I disagree with the first part of that.
8 There is just no evidence of that.

9 MR. SHUR: My point is the progress reports tend to
10 corroborate that. Now, whether there is an argument to be had
11 they're not being sent to the State, they're being sent to
12 someone else so therefore you are not focused on it, that goes
13 to the weight, not the admissibility.

14 THE COURT: I'm not going to let them in. If this was
15 a point you wanted to make you should have used them with the
16 witness so that he could explain and the questions could be
17 asked. Otherwise, it is just an out-of-court declaration that
18 you are using for a purpose that may or may not be accurate and
19 it is hearsay and so, no, it is out.

20 244?

21 MR. SHUR: 244 is the letter from Columbia to the
22 Department of Labor regarding resolution of the OSHA violation.

23 THE COURT: Correct.

24 MR. SHUR: There was a question as to where did the
25 document come from.

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charge conference

1 THE COURT: And you linked it up, right? We received
2 the document from the New York State Comptroller's Office in
3 response to a subpoena and so what we provided to the
4 government was the cover letter from the comptroller's office
5 which enclosed the document which is part of the comptroller's
6 contract file for the second grant so it actually is linked up
7 by the number of the grant. And so, this was part of the
8 contract file found in the comptroller's office. A lot of that
9 file is duplicative of what's already been introduced.
10 However, to sort of put it in context we are happy to move in
11 the comptroller's contract file itself which isn't voluminous.

12 MS. COHEN: Your Honor, part of the problem of putting
13 in these documents, while it may be a business record, while it
14 may be authentic, this whole issue about this OSHA violation
15 that they want to focus on, I think they want to use that to
16 argue improperly to the jury certain facts not in evidence and
17 putting this in is what they're going to use to do that and if
18 they wanted to make some argument about the OSHA violation,
19 held up by first contract or second contract, they needed to
20 call a witness to talk about that. They choose not do that and
21 I think what they're trying to do is put in a document under
22 the auspices that this is a business record related to the
23 contract when there already are the contracts, they're already
24 in evidence. There is no reason to add yet another contract in
25 evidence except that I believe they want to use certain

FBJ5sil4

charge conference

1 documents related to OSHA for some totally improper purpose
2 that is not true and is not what happened and there is no
3 evidence about it. So, we object.

4 THE COURT: I'm surprised you don't feel strongly
5 about this.

6 MR. SHUR: Judge, I'm not sure what the alternative
7 theory is in terms of what actually happened but the facts are
8 that it took a while for the grant to be processed because the
9 comptroller's office identified an OSHA violation.

10 THE COURT: That's the fact that is the problem. You
11 are saying the because and maybe that's right and maybe that's
12 not right.

13 MR. SHUR: But the point is the relevance of the
14 document and all of these business records is it shows that
15 there was a process in place that was followed, it wasn't
16 people just shuffling papers.

17 THE COURT: And you have got that, you have got the
18 evidence of that.

19 (Continued on next page)
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FBJYSIL5

1 MR. SHUR: But my point is this is not cumulative.
2 What we have in evidence is people at Columbia processing the
3 work. We have the Department of Health processing the work.
4 This is a new piece. It's not cumulative of some other
5 evidence.

6 THE COURT: It is cumulative of the point that you're
7 using it for, which is there was actually a review process in
8 the state which, my recollection is Mr. Molo went through
9 everything in extreme detail in the cross of Mr. Franco maybe.

10 MS. COHEN: Mr. Franco and Mr. Whalen and Mr. August.

11 THE COURT: Overruled. That one is not coming in.

12 What else?

13 MS. COHEN: The rest of them, your Honor, I believe
14 are new exhibits.

15 MR. SHUR: They're not new --

16 MS. COHEN: There are a bunch that are new.

17 THE COURT: Stop. Don't argue about whether it's new
18 or not new. What's the next document?

19 MS. COHEN: The next document I have is Defense
20 Exhibit 1088. Is that right?

21 MR. SHUR: That's fine. This is a senate bill on the
22 property tax cap bill that was passed by the senate only. It's
23 relevant because it shows that the property tax cap was a
24 priority of the senate and that it didn't pass in the assembly.

25 This goes to the defense's argument that Mr. Silver in

FBJYSIL5

1 negotiating the rent regulation tied to the property tax cap
2 which would have a pro-tenants outcome because then going
3 forward it would be tied to a property tax cap which is
4 something the senate cared about, but they didn't care about
5 the rent regs.

6 THE COURT: That came out.

7 MR. SHUR: That's not to the exclusion of the evidence
8 that corroborates it.

9 MS. COHEN: Your Honor, if they wanted to use it, it
10 should have been used with Mr. Runes to see whatever context
11 there is.

12 MR. SHUR: Ms. Cohen --

13 THE COURT: Don't even talk to her. Talk to me or
14 talk to nobody.

15 MR. SHUR: Done, Judge.

16 THE COURT: According to this, this passed the senate,
17 and then it died in the assembly. Then it was returned to the
18 senate, and it was referred to finance. It appears that it
19 didn't pass.

20 The question is -- I'm sorry. I don't know what this
21 proves. Tell me again what this proves.

22 MR. SHUR: Sure.

23 THE COURT: It doesn't prove this was a priority of
24 the senate. It proves that the senate passed it.

25 MR. SHUR: It wasn't passed in the assembly as part of

FBJYSIL5

1 the effort to tie it to the rent regulation laws. It was an
2 open issue that Mr. Silver then tied to the rent regulation
3 laws.

4 THE COURT: How is that shown?

5 MR. SHUR: It doesn't definitively prove that, but it
6 certainly tends to corroborate that argument. It's a building
7 block to making that argument.

8 THE COURT: The point is that this doesn't -- you're
9 going to put this in for the jury to figure out from this that
10 there's no tie in this law to rent regulation?

11 MR. SHUR: No. That it wasn't passed in the assembly.
12 It was an open item to be tied to the rent regulation law.

13 MS. COHEN: Your Honor, this is the problem that
14 introducing all these bills with no context. If they wanted to
15 march the jury through the history of all that, they could have
16 called a witness, and they chose not to.

17 THE COURT: Tell me again what this bill does.

18 MR. SHUR: If I understand it correctly, it died in
19 the assembly. So the assembly did not pass this because of the
20 effort to tie it to the rent regulation law.

21 MS. COHEN: There's no testimony to that in the
22 record.

23 MR. SHUR: There is. Mr. Runes testified that --

24 THE COURT: He testified that it was this bill that
25 was the issue?

FBJYSIL5

1 MR. SHUR: That the property tax bill that Mr. Silver
2 attempted to tie the property tax bill to the rent regulation
3 law which would be pro-tenant.

4 THE COURT: There's evidence to that effect?

5 MR. SHUR: This supports that testimony.

6 THE COURT: I'm not letting that in. That would be
7 confusing for the jury.

8 MR. SHUR: 109 is a senate bill that shows that the
9 senate was advocating for a stronger version of 421a, including
10 a new tax exemption for converting commercial buildings into
11 residential buildings. Then what was ultimately passed -- it's
12 relevant to the compromise between the assembly and the senate.

13 THE COURT: Here is my feeling on this -- you have a
14 whole stack of these. This is going to be meaningless to the
15 jury because legislation is meaningless to everyone other than
16 the staffers that work on it.

17 So the only way anybody is going to make heads or
18 tails out of this is by the lawyers telling them what's in
19 here, and that's improper.

20 If you wanted to develop this whole back-and-forth,
21 this bill, that bill, this does this, that does this, that's
22 why Silver had a big kumbaya, him and Mr. Skelos came together
23 and said, this is what we're going to do, you need testimony on
24 that.

25 I just can't let bills go to the jury for the defense

FBJYSIL5

1 to describe. So no.

2 MR. SHUR: The next one is 143, which is the Budget
3 Reform Act. It simply shows that Mr. Silver was a cosponsor of
4 the bill. The relevance there --

5 THE COURT: It's the what?

6 MR. SHUR: Budget Reform Act.

7 THE COURT: Of what year?

8 MR. SHUR: 2007. The relevance is the government's
9 argument is that the grants stopped because the Budget Reform
10 Act required additional disclosure.

11 The response to that we want to show that Mr. Silver
12 cosponsored the same bill that it continued to give them grant
13 money. There's no evidence currently if the record of that. I
14 did ask Mr. Franco the question. He said he didn't know. So
15 this just proves that point.

16 MS. COHEN: Again, this is sort of the same problem.
17 Introducing all these bills with no context with no one on the
18 witness stand.

19 THE COURT: Will the government stipulate that Silver
20 was a cosponsor of the bill?

21 MR. SHUR: That's the only fact. So that would be
22 sufficient.

23 MS. COHEN: The Budget Reform Act?

24 THE COURT: They want it to say that he was a
25 cosponsor of the bill.

FBJYSIL5

1 MS. COHEN: Then we would put on testimony about what
2 cosponsorship means. Had this come up on the stand, we would
3 have asked a question, what does it mean to cosponsor a bill,
4 and Mr. Runes, among others, would have told us that it's not
5 particularly meaningful.

6 MR. SHUR: It did come up. A question was asked.

7 MR. GOLDSTEIN: Just so the record is clear, the
8 government's theory is not that this bill is the only reason
9 why the disclosure rules changed.

10 It was a series of things that all happened right at
11 this time to enhance the disclosure requirements.

12 MS. COHEN: The disclosure forms to the Attorney
13 General's office, the internal Ways and Means.

14 MR. GOLDSTEIN: So whatever probative value, if there
15 really is any, of Sheldon Silver cosponsoring this piece of
16 legislation, among others, is outweighed by trying to put it in
17 at the end of a case where there's no context to it at all.

18 MS. COHEN: And claim that the cosponsor is something
19 that it's not. And claim -- the witness, if he had been asked
20 when he was on the stand, would have explained it's essentially
21 meaningless.

22 THE COURT: Some of my concern is -- because I don't
23 know what all is in here. It's hard to assess -- I understand
24 what the defense wants to use it for. It's sort of hard to
25 assess what that -- what it means if he was a cosponsor of this

FBJYSIL5

1 bill which does lots of things.

2 MR. SHUR: We're happy to draft a stipulation that
3 focuses on the relevant piece of the bill so that jurors aren't
4 having to sort through this and trying to make sense of it.

5 It's a very simple fact. The additional disclosure
6 pursuant to the Budget Reform Act, which the government said is
7 one of the things that caused Mr. Silver to stop giving grant
8 money was cosponsored by Mr. Silver.

9 MS. COHEN: The stipulation doesn't deal with the
10 issue that had it been raised when people were on the stand, we
11 could have elicited testimony about what it actually means.

12 MR. SHUR: Judge, the whole point of this -- I just
13 want to make sure there's no confusion -- is we didn't put on a
14 defense case.

15 So we're trying to streamline this by not dragging out
16 the trial any longer than it needs to be about considering
17 facts that are undisputed.

18 I don't think there's any dispute that Mr. Silver
19 cosponsored the Budget Reform Act unless I'm missing something.

20 MR. GOLDSTEIN: Our argument is that there really is
21 no probative value of that if there's been no testimony as to
22 which parts of the bill he was in favor of, what the background
23 was.

24 THE COURT: That's been my concern about all this. I
25 don't know why things happened. For whatever reason the

FBJYSIL5

1 government decided not to try the case based on what was
2 happening in closed-door meetings and what staffers were saying
3 to each other and why things were happening.

4 So you're just kind of left with the result that
5 things did happen. I personally think the probative value is
6 not substantial, but I can't say that it's zero. It's a
7 defense proposal. I'll let it in, but I would prefer for it to
8 come by virtue of a stipulation.

9 MS. COHEN: Why don't you draft something.

10 THE COURT: Okay. 1438.

11 MS. COHEN: If we can agree on a stip, we want to --
12 we'll just have the first page of it.

13 MR. SHUR: We'll prepare something.

14 THE COURT: What's next?

15 MR. SHUR: 144, which is an email chain. The gist of
16 this, Judge, is that it tends to prove that Ms. Rapfogel,
17 Mr. Silver's chief of staff, had directed the letter regarding
18 the Jonathan Taub resume and job to Ohel as opposed to
19 Mr. Silver.

20 MS. COHEN: That's exactly the problem with putting in
21 the document without the witness.

22 THE COURT: Let me read it. You can only put this in
23 if you have a live witness.

24 MR. SHUR: Okay.

25 MS. COHEN: They've already said they're not going to

FBJYSIL5

1 call witnesses.

2 THE COURT: If they change their mind, they change
3 their mind. If you're going to change your mind, let me know.

4 MR. SHUR: I understand, Judge.

5 The next document or exhibit is 145-03. The relevance
6 of this -- this shows that the other two recipients of the
7 resolution also received a proclamation, meaning that Dr. Taub
8 wasn't treated differently than the other two recipients. All
9 three of them received resolutions and proclamations.

10 THE COURT: Is there any objection?

11 MS. COHEN: Well, I would note that Deb Miller would
12 is on the number two line was on the witness stand. There must
13 be a reason that they didn't ask her about it.

14 THE COURT: Do you object?

15 MS. COHEN: Is there a reason you want to put this in
16 that you didn't ask Deb Miller? If I could hear that, maybe I
17 wouldn't object. I'm not so sure.

18 MR. SHUR: I did not examine Ms. Miller. So I can't
19 personally answer that question.

20 THE COURT: The question was why didn't you ask
21 Ms. Miller about the proclamations for the other --

22 MR. SHUR: I'm not sure that's a relevant question.

23 MS. COHEN: They actually did ask her about it. They
24 just didn't put in the document. I just want to know if
25 there's something else behind it. If the answer is you forgot,

FBJYSIL5

1 that's fine.

2 MR. SHUR: There's no nefarious reason why Ms. Millers
3 wasn't asked about the proclamation.

4 THE COURT: I'm going to let 145-03 in. How many more
5 are there? I'm asking if the government objects to all of
6 them.

7 MS. COHEN: We do.

8 MR. SHUR: This is 148 and 150. Both have to do with
9 the Shalom Task Force. 148 is a letter from Mr. Silver to a
10 few people -- Ms. Waldman, Ms. Lax, Ms. Weintraub -- informing
11 them that he had met with Shalom Task Force leaders recently
12 and thanking them for contacting his office and praising their
13 work.

14 It tends to show that there was a noncorrupt reason
15 for --

16 THE COURT: No. You need a witness for that. You
17 need a witness.

18 150.

19 MR. SHUR: 150 is a little bit different in that --
20 actually a lot different. It's the letter from Shalom Task
21 Force to Mr. Silver's office requesting the grant money.

22 As you may recall, minimal testimony from Dr. Taub
23 Shalom Task Force came into the case was that he had edited a
24 letter -- it was actually a draft of this letter.

25 The edits of Dr. Taub's letter in the red-lined

FBJYSIL5

1 version that came from his computer -- none of them made it
2 into the final draft which I think tends to show that Dr. Taub
3 wasn't involved in the process of requesting the money.

4 MR. GOLDSTEIN: There's no evidence that that's the
5 final draft.

6 MS. COHEN: This is not a signed draft. If you're not
7 calling a witness from Shalom --

8 MR. SHUR: This came from the assembly's offices.

9 THE COURT: No. You need a witness for that.

10 MR. SHUR: The next is 149, which is a group exhibit
11 of letters of recommendations for jobs that Mr. Silver wrote
12 for a number of people which show that the Jonathan Taub and
13 Amy Bandler jobs, in terms of Mr. Silver helping out with them
14 getting jobs was not an outlier and again would show -- tend to
15 prove it was not for a corrupt reason.

16 MS. COHEN: Your Honor, they're hearsay. They're not
17 relevant. Other letters of recommendation to other people are
18 not relevant.

19 THE COURT: One of them appears to be for Saul
20 Weprin's daughter, Joy Weprin. I assume that's the
21 assemblyman's daughter?

22 MR. COHEN: Granddaughter.

23 THE COURT: No. You need a witness for this. I have
24 to say -- is this the sole -- is this all of them?

25 MR. SHUR: No. It's just a sampling. We could put

FBJYSIL5

1 together another doorstep, Judge, if you'd like.

2 MR. COHEN: I could get another resolution box.

3 MR. SHUR: The next group of exhibits are assembly
4 records from Mr. Silver's office that are remarks that
5 Mr. Silver made at different official events regarding the air
6 quality in lawyer Manhattan after 9/11.

7 THE COURT: No. What's the exhibit number? No.

8 MS. COHEN: 205, 208, 209, 210, 211, 212, 213, and
9 215.

10 MR. SHUR: And 216 and 217.

11 THE COURT: Essentially 205 through 217.

12 MS. COHEN: Skipping 206 and 207.

13 MR. SHUR: And 214.

14 THE COURT: What else?

15 MR. SHUR: This is Exhibit 237. It is -- this relates
16 to the grants to Columbia. So the executed contract -- what
17 happens in the grant review process is the contract gets
18 executed, which is in evidence, but there's still additional
19 process that has to take place with the comptroller's office,
20 etc.

21 So this memo actually shows the date on which it was
22 actually approved informing Columbia. It sort of completes the
23 narrative and completes the time frame that we're talking
24 about.

25 THE COURT: This was sent -- this doesn't appear to be

FBJYSIL5

1 sent to Columbia or Presbyterian.

2 MS. COHEN: I have 237 and 240 as different ones.

3 MR. SHUR: What happened here was -- we could
4 introduce it with the executed contract. If you read the text,
5 it says attaches your copy of the approved contract.

6 I think we have a business records certification that
7 goes along with it that indicates that this was actually sent
8 to the hospitals. We have one for each of the two contracts.

9 THE COURT: Any objection?

10 MR. GOLDSTEIN: I think the contracts themselves have
11 signature blocks.

12 MR. SHUR: My point is they're executed, but then
13 there's additional process that takes place before it's
14 actually approved.

15 MS. COHEN: Isn't that additional process already in
16 the contracts?

17 MR. SHUR: No. It says -- these dates are
18 different --

19 THE COURT: This date is different.

20 MR. SHUR: -- from the executed contract date or the
21 approved date. There are additional steps that need to take
22 place.

23 MS. COHEN: I actually think this is confusing, again.
24 I don't know what extra steps they want to argue at closing
25 that aren't in evidence that were taken.

FBJYSIL5

1 We had numerous witnesses on the stand about the
2 contract. I just don't get it. Unless they want to argue
3 about steps that aren't in evidence.

4 THE COURT: Is your point that the money didn't start
5 flowing until after March 8, 2006?

6 MR. SHUR: It wasn't even finally approved until that
7 date.

8 THE COURT: I'm not sure that's true. This doesn't
9 say that. This just says attached is the copy of the approved
10 contract. It doesn't say that it wasn't finally approved until
11 then.

12 My vaguest of all recollections is there are times
13 when an oral goes so the agency can tell the grantee that
14 everything has been approved and then like paperwork follows.

15 MR. SHUR: Right. It also indicates that payments
16 aren't to be made until certain steps are taken.

17 THE COURT: That's all in the contract. So no. That
18 one is out.

19 What's next?

20 MR. SHUR: 241 is just the same document. 240 is the
21 same document for the other grant.

22 THE COURT: So same ruling on that. No.

23 MS. COHEN: I have 241.

24 MR. SHUR: 241 is -- I guess it's called a call list.
25 It's an assembly document. I think actually simpler documents

FBJYSIL5

1 were introduced by the government.

2 The relevance to this one is that page 5 shows that
3 new HCRA is to be processed and includes the second grant to
4 the Meso Center.

5 The relevance of this is that Dr. Taub had sent a
6 request letter to Mr. Silver for the second grant in
7 March 2006. This shows that it's not approved until June 2006.
8 So it's not as if Mr. Silver is jumping to get this done.

9 Further, Dr. Taub -- this is in evidence. The
10 government introduced this document into evidence -- that
11 there's an October 2006.

12 So after it was internally approved within the
13 assembly, Dr. Taub, months later in October 2006, is sending a
14 letter to Mr. Silver following up saying, what about my second
15 grant, which shows a little bit of a disconnect between
16 Mr. Silver and Dr. Taub and that he's approved it and that
17 information hasn't been communicated to Dr. Taub.

18 So if you're in a corrupt relationship --

19 THE COURT: I understand why you want it in. You need
20 a witness for that.

21 MR. SHUR: The next document is 300, which is a group
22 exhibit of legislative initiative forms that simply show that
23 Mr. Silver was -- the government opened and said that a lot of
24 worthy public health projects were not funded because
25 Mr. Silver was giving money to Dr. Taub's research.

FBJYSIL5

1 This simply shows that during the relevant time period
2 Mr. Silver was funding a variety of different worthy public
3 health projects.

4 THE COURT: No. This can't come in. This is sort of
5 like he didn't do bad things some days. They didn't say that
6 he used up all of his money.

7 MR. SHUR: They did say that other worthy projects
8 weren't funded, which suggested --

9 THE COURT: By definition, if \$250,000 went to this
10 project, that \$250,000 couldn't go to the other project.

11 MR. SHUR: Fair enough. There are two outstanding
12 issues, and then I think we're done. One is in response to the
13 discussion yesterday, Judge, about the defense had proposed a
14 stipulation having to do with the fact that the engagement
15 letter and tax cert matter doesn't need to be filed with the
16 Court.

17 THE COURT: Yes.

18 MR. SHUR: I understand, if I remember correctly, that
19 your Honor's concern, in terms of the relevance of that
20 information, is that what's relevant is Mr. Runes' state of
21 mind. He might have incorrectly thought it was filed, and
22 that's what's relevant in terms of the side letter; right?

23 THE COURT: Yes.

24 MR. SHUR: In response to that, what we would like to
25 introduce are for one or two tax cert matters that Golberg &

FBJYSIL5

1 Iryami handled for Glenwood, one or two before the side letter
2 and one or two after the side letter, the records that were
3 filed with the relevant agencies would show that the engagement
4 letter was not included.

5 THE COURT: How does that solve the problem?

6 MR. SHUR: Maybe it's not relevant to Glenwood or to
7 Mr. Runes' state of mind, but it's certainly relevant to
8 Golberg & Iryami who drafted the side letter and who engage in
9 those tax cert matters and filed those documents.

10 So, clearly, at least with respect to Golberg &
11 Iryami's state of mind, they were not preparing a side letter
12 to avoid having to have Mr. Silver's involvement disclosed to a
13 court because they had to file an engagement letter because
14 they didn't, and that wasn't part of the process, and they knew
15 that.

16 So I understand maybe not relevant to Glenwood or
17 Mr. Runes, but it's certainly relevant to Golberg & Iryami.

18 THE COURT: Why is that relevant?

19 MR. SHUR: Well, Golberg & Iryami actually prepared
20 the side letter. I think the government's argument is that
21 everyone involved in the side letter prepared it because they
22 didn't want Mr. Silver's involvement to be known to the world.

23 THE COURT: Iryami didn't know anything about it;
24 right?

25 MS. COHEN: Correct.

FBJYSIL5

1 THE COURT: So any questions to her fell on deaf ears
2 because she didn't know. The only witness that testified about
3 this that was asked a question was Runes.

4 MR. SHUR: That's not true.

5 THE COURT: No. That was asked the question of why
6 the side letter. What was being accomplished by a side letter.
7 His testimony, which is the only testimony in the record, is we
8 were -- in essence, he thought the retainer agreement had to be
9 filed, but the side letter wouldn't have to be.

10 MR. SHUR: Right.

11 THE COURT: So the only evidence in the record is
12 that.

13 MR. SHUR: But I think the concern is -- and I think
14 the prejudice -- is that the jury could conclude from
15 Mr. Runes' testimony that that is in fact the case, that it
16 gets filed. Therefore, Golberg & Iryami also prepared it to
17 avoid the disclosure.

18 THE COURT: Here is the thing. If you want to get
19 that in, you're going to have to call somebody who can testify
20 to it and let them be subject do cross-examination.

21 MR. SHUR: Then the final issue --

22 THE COURT: Frankly, I would love to have the answer
23 to that.

24 What did they think they were accomplishing?

25 MR. SHUR: There are some times side letters prepared

FBJYSIL5

1 in connection with transactions.

2 THE COURT: There's almost always a reason.

3 MR. SHUR: They didn't call Mr. Dorego. So we're
4 never going to find out I guess.

5 THE COURT: Nor did you.

6 MR. SHUR: We don't have the burden.

7 THE COURT: I understand that.

8 MR. SHUR: The last issue is during yesterday's
9 testimony, the agent who testified about the summary charts --
10 there's an issue that came up that -- I don't know if you
11 remember there was sort of a summary chart that involved like
12 almost like a round-trip transaction, if you will.

13 THE COURT: Yes.

14 MR. SHUR: So I think I mentioned something at the
15 bench that I should probably correct because just very quickly
16 but I think this background is helpful, there was an account
17 that was frozen in connection with the forfeiture orders that
18 was an investment account of Mr. Silver's that was managed by a
19 company called Hugh Johnson, which is an investment adviser.

20 We had made a request to the government to have the
21 money manager continue to manage the funds. The government
22 asked us if they could reach out to the money manager and do
23 some due diligence about the money manager, and we agreed.

24 That turned into us consenting to the money manager
25 producing documents relating to Mr. Silver's account

FBJYSIL5

1 voluntarily versus pursuant to subpoena.

2 I think maybe a few weeks before trial, the money
3 manager reached out to us to say that the government inquired
4 about a transaction involving Mr. Silver's sister.

5 Before we voluntarily disclosed information regarding
6 this transaction, we needed Mr. Silver's consent. Our
7 understanding, based on Hugh Johnson's description to us of the
8 transaction is simply that Mr. Silver's sister also has an
9 account at that investment adviser firm and that there was a
10 check that bounced.

11 I forget exactly what the circumstances were, but
12 there was a short-term loan from Mr. Silver who sent a check to
13 cover the amount that was owed on the sister's account, and she
14 repaid the balance of that prosecute Mr. Silver.

15 Our understanding from talking to Hugh Johnson was
16 that that information was going to be relayed to the
17 government. The government inquired. We consented.
18 Apparently, that was never connected up, and they never talked
19 to the government about that is my understanding.

20 MR. GOLDSTEIN: We reached out, and they never
21 contacted us back.

22 MR. COHEN: If I am right in what I said at the bench
23 and it's Mr. Silver's sister, there's no nefarious purpose to
24 it.

25 MR. SHUR: I don't know that we have a problem with

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1 the chart, and it's factually correct. I don't know if the
2 government -- what the government plans on arguing in
3 connection with that chart or that transaction.

4 But it's simply the business records of that
5 transaction which indicate it's Mr. Silver's sister and what
6 the circumstances were surrounding that transaction, whether
7 that can be done by stipulation or the business records, that's
8 the last remaining item from the defense.

9 MR. GOLDSTEIN: We're not planning to argue in
10 summation that transaction was nefarious except to the extent
11 that --

12 MR. MASTER: It involved proceeds of the crime.

13 MS. COHEN: We're not arguing that the loan
14 back-and-forth was nefarious. It was just to trace the money.

15 THE COURT: I thought it was very curious.

16 MR. SHUR: My understanding of the 1957 charge is the
17 money doesn't need to bounce around a bunch of times. It just
18 needs to be deposited once basically for 1957. So I wasn't
19 sure why the government highlighted that transaction on the
20 summary chart.

21 If I was sitting on the jury, I'd be saying, who is
22 that person and what is this transaction all about?

23 MR. GOLDSTEIN: There are parts of the transaction
24 that were highly suspicious. We provided you with a draft of
25 that chart a month ago.

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1 For us -- we did not hear from Hugh Johnson. You
2 didn't tell us that there was some improper insinuation from
3 the chart. So then we put it on properly. So I'm not sure I
4 understand what the issue is.

5 MR. SHUR: The only issue is the business records that
6 indicate it's Mr. Silver's sister and the circumstances of the
7 transaction. We're happy to do a stipulation or to offer it up
8 as business records.

9 MS. COHEN: The records are in evidence.

10 MR. MASTER: We also asked you if we could include the
11 Arlene Lerer Banco Popular and Fidelity accounts.

12 MR. SHUR: I don't think the records that were
13 introduced -- correct me if I'm wrong -- indicate that it was
14 Mr. Silver's sister and the circumstances of the transaction.

15 MR. MASTER: In terms of the circumstances of the
16 transaction, they are what they are. There was a substantial
17 balance in the Fidelity account at the time that the money was
18 moved in, and there remained a substantial balance afterwards.

19 So in terms of the representation that this is some
20 short-term loan, I don't understand why --

21 MS. COHEN: It would be hearsay.

22 THE COURT: What you're telling me is that -- do you
23 have the chart?

24 MS. COHEN: Mr. Coccaro can pull it up.

25 THE COURT: It's a curious transaction. Is your

FBJYSIL5

1 premise that that \$100,000 was because the sister had bounced a
2 check?

3 MR. SHUR: There was a shortfall. Right.

4 THE COURT: But the \$100,000 goes in, and \$250,000
5 goes out. So, to the extent there was a shortfall, more than a
6 shortfall came out of the sister's account to the sister's
7 Fidelity account.

8 So \$100,000 goes into Banco Popular. A quarter of a
9 million dollars the same day comes out of Banco Popular down
10 into the Fidelity account.

11 MR. COHEN: Mr. Silver's only role is lending his
12 sister the money, and then she returns it in four or five
13 months or something like that. It's on that chart.

14 THE COURT: The \$100,000 just kind of takes a trip
15 through Arlene Lerer's accounts but then comes back and drops
16 into JoRon, which is why they needed to do this, because the
17 HSBC account didn't have a big enough balance until the money
18 round tripped back into the account to do the JoRon investment.

19 So the chart itself was entirely proper. What you're
20 trying I think to argue is that this was a legitimate
21 transaction where Mr. Silver loaned his sister \$100,000.

22 His sister then kind of again, without having anybody
23 on the stand and being able to cross-examine them, you would
24 say, well, why didn't you just deposit the 100K into the
25 Fidelity account? Why trip it through Banco Popular?

FBJYSIL5

1 MR. COHEN: What's the value of all this is the
2 question?

3 THE COURT: They had to do it because for their money
4 laundering count, they've alleged that's one of the
5 transactions, is the deposit of \$16,000 on May 29 into JoRon,
6 and they can't trace that -- to trace from the illicit funds,
7 they have to trace through the Arlene Lerer's account.

8 MR. SHUR: Is that one of the money laundering
9 allegations?

10 MR. MASTER: It was one of the transactions. It was
11 transaction 7.

12 MR. COHEN: I don't think you need that generally for
13 the money generally going from Mr. Silver's accounts into an
14 account at Financial.

15 THE COURT: You do because you can't trace it
16 otherwise. They could have charged that the money laundering
17 was moving the money from the HSBC account to the Banco Popular
18 account. That would have satisfied the 1957 charge, but that
19 wasn't what they charged.

20 MR. COHEN: I guess the question is: What are they
21 proposing to say about that transaction? Ms. Cohen said before
22 that they're not suggesting that there was something nefarious
23 about this.

24 MS. COHEN: About the loan?

25 THE COURT: About the round trip.

FBJYSIL5

1 MR. COHEN: About the return of the loan.

2 MS. COHEN: No. We're just showing how the money
3 moved, which we have to show.

4 MR. COHEN: I don't know if they need to show that.

5 MS. COHEN: We do.

6 THE COURT: They have alleged in one of their money
7 laundering counts that illicit proceeds were deposited to JoRon
8 Management. They have to prove that the funds were illicit
9 funds.

10 MR. COHEN: They don't need that transaction for that.

11 THE COURT: They do. I don't know what you're asking
12 me to do. If you can work out something with the government --

13 MS. COHEN: We're not going to make the argument.

14 MR. SHUR: Just a stipulation that that's Mr. Silver's
15 sister so that it's not some random --

16 THE COURT: Are you willing to stipulate to that?

17 MR. SHUR: Part of the problem is her last name is the
18 same name as one of the investments. It's confusing to the
19 jury.

20 MS. COHEN: We'll stipulate that Arlene Lerer is
21 Sheldon Silver's sister. You can just read that in when you
22 put your exhibits in. Just say that.

23 MR. COHEN: I also said that the reason why you raised
24 the issue that she was care of on the account in New York, and
25 I said if it was accepted that she was in London. That's why

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1 her name was on the account.

2 MS. COHEN: We're not going to go down the road of why
3 different money is being moved. We're not going to make the
4 argument. We're happy to stipulate it's his sister.

5 THE COURT: Will you say during your summation that
6 there's nothing nefarious about the triangle?

7 MS. COHEN: No. We're not going to be pulling out
8 anything that's not nefarious.

9 MR. GOLDSTEIN: We're not going to say this is a
10 completely legitimate transaction.

11 MS. COHEN: It's his sister.

12 There is also defense Exhibit 247, Mr. Cohen, which is
13 your chart.

14 MR. COHEN: Yes.

15 MS. COHEN: It was identified at trial but not
16 admitted.

17 MR. COHEN: In fairness, there is a slight change.
18 I've discussed it with Mr. Master. That is not exactly the
19 exhibit that was shown to the agent.

20 MS. COHEN: Do you want to make it 247-1?

21 MR. COHEN: 247-1.

22 MS. COHEN: These are the percentages. She couldn't
23 do the calculations on the stand.

24 THE COURT: What's the issue?

25 MS. COHEN: We don't have an issue, your Honor.

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1 MR. COHEN: They're accepting it.

2 THE COURT: 247-1. Then there will be a sister
3 stipulation.

4 MS. COHEN: I assume you're not going to do it in
5 writing. You're just going to say it.

6 THE COURT: Anything else?

7 MS. COHEN: There are proposed transcript changes. We
8 have shown them to the defense. They are fine with all of them
9 except the one that is the Court's language. They think we got
10 wrong. So we leave it up to you, your Honor.

11 MR. SHUR: That's our position. It doesn't appear to
12 be correct in the transcript. I'm not sure that the
13 government's changes --

14 MS. COHEN: Which is why we leave it up to your Honor.

15 THE COURT: I don't even know what I'm looking at.

16 MS. COHEN: Mr. Coccaro can pull it up for you. It's
17 page 451.

18 MR. GOLDSTEIN: It's the third entry in this chart.

19 THE COURT: I think I said it would have been righter
20 if they would have given you more money.

21 MR. SHUR: That makes sense.

22 MS. COHEN: Righter.

23 THE COURT: Not the most articulate. So "It would
24 have been righter if they would have given you more money, I
25 bet."

FBJYSIL5

1 MS. COHEN: With that correction, I'm going to give
2 this to the court reporter.

3 Your Honor, now that we've ruled on all the exhibits,
4 can we be told if there are going to be any witnesses on Monday
5 morning?

6 THE COURT: Is there changing anything?

7 MR. SHUR: It doesn't change anything, Judge.

8 THE COURT: So no witnesses.

9 MS. COHEN: There will be no witnesses? Confirmed?

10 MR. SHUR: Correct.

11 MS. COHEN: And all of these exhibits that have
12 already been ruled on to be admitted.

13 THE COURT: So just to confirm, you both have
14 responsibilities to exchange proposed drafts including where
15 they go in the charge at 9:00 tomorrow morning. Submit it to
16 me at noon tomorrow.

17 We'll re-do the charge. We'll get it out to you as
18 soon as possible. You need to let me know by Sunday morning if
19 there are any substantial issues. If so, email to chambers box
20 by noon on Sunday. If so, we'll meet at 8:30. Otherwise, you
21 need to be in at 9:15.

22 MR. COHEN: You have our motion under advisement?

23 THE COURT: I have your motion under advisement. I
24 will let you know if it's granted.

25 MR. MOLO: And they get three hours. We get three

FBJYSIL5

1 hours?

2 THE COURT: It's three, three, one. You get a break
3 midway. We'll break for lunch. If all goes well, if the
4 jurors are here on time and there's no new 12 exhibits that you
5 have to have rulings on, we should start summations at about
6 9:45, which means we break for lunch, have an hour break for
7 lunch, defense summation, we take a break, rebuttal summation,
8 they go home for the day.

9 MR. MASTER: To we're done at 5:30.

10 THE COURT: More or less. Feel free to shorten any of
11 these times.

12 MR. SHUR: Judge, just one minor point. I don't think
13 you're going to care. I know it sounds like you're going to
14 charge the jury on Tuesday.

15 THE COURT: Yes.

16 MR. SHUR: I have a meeting scheduled at the deputy
17 Attorney General's office on another matter on Tuesday. I'm
18 going to try to reschedule. If I can't reschedule, I wasn't
19 sure if I could potentially be excused.

20 THE COURT: You're excused.

21 If either of you are using demonstrative charts in
22 your summation, you must provide the other side with a copy of
23 the chart by noon Sunday.

24 If there are any objections to each others chart and
25 you can't work them out between you, you need to tell me by

FBJYSIL5

1 5:00 on Sunday and be here at 8:30.

2 If there are new charts and the other side objects,
3 you're not going to get to use your chart.

4 MS. COHEN: Other than what we've shared.

5 THE COURT: Other than what you've shared.

6 MR. GOLDSTEIN: In terms of how one defines "chart,"
7 we're doing like a timeline.

8 THE COURT: I think we can now go off the record.

9 (Adjourned to November 23, 2015, at 9:15 a.m.)

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